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No._____

IN THE

Supreme Court of the United States

October Term, 1986

UNITED DAIRYMEN OF ARIZONA,
Petitioner,

vs.

JEROME LaSALVIA and PEGGY LaSALVIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The trial court, on the basis of Respondents' deposition testimony and documentary evidence, granted Petitioner's motion for summary judgment dismissing Respondent's unilateral and concerted refusal to deal claims, filed in 1980, concluding that there was no genuine issue of material fact as to the finality of Petitioner's refusal and that the cause of action which accrued in 1975 was barred by the § 4B Clayton Act four year statute of limitations. The questions presented are the following:

1. Where a trial court grants defendant's motion for summary judgment dismissing an antitrust action on statute of limitations grounds on the basis of material facts relating to the merits of the action affirmatively asserted by the plaintiff in a fully developed discovery record, may an appellate court review *de novo* and reverse the trial court's finding of "no genuine issue of material fact" as to the finality of defendant's refusal to deal on the basis of defendant's denial of those facts?

2. Whether an unlawful unilateral or concerted unequivocal refusal to deal gives rise to a cause of action when it occurs and is not restarted by repeated requests which the defendant refuses.

3. Whether a plaintiff who has suffered ascertainable antitrust damages more than four years prior to commencing an action from a unilateral or concerted unequivocal refusal to

deal may avoid the bar of § 4B of the Clayton Act because damages stemming from the prelimitation refusal may have continued during the limitation period.

4. Whether *Hanover Shoe Co. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) established an exception to the settled rule that an antitrust claim accrues and the statute of limitations begins to run each time that the defendant commits an overt act that injures the plaintiff.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below:

1. All parties listed in the caption of this petition.

2. Robert M. Girard, Petitioner's manager.

3. Leonard Cheatham, Petitioner's former president.

United Dairymen of Arizona has no parent or subsidiaries.

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Petitioner, United Dairymen of Arizona, prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals filed on November 21, 1986.

OPINIONS BELOW

The opinion of the court of appeals is reported at 804 F.2d 1113 (9th Cir. 1986) and appears herein as Appendix A. The November 10, 1983 order of the district court denying defendant's original motion for summary judgment (App. B.) is unreported. The December 21, 1984 order of the district court granting defendant's renewed motion for summary judgment dismissing the complaint (App. C. at A-19) is unreported.

JURISDICTION

The judgment of the court of appeals (App. D. at A-28) was filed on November 21, 1986. A timely petition for rehearing with suggestions for rehearing en banc was denied on January 20, 1987. App. E. at A-29. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . .

Section 4B of the Clayton Act, 15 U.S.C. § 15b:

> Any action to enforce any cause of action under sections 15, 15a or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . .

Rule 56, Federal Rules of Civil Procedure, Summary Judgment:

> (b) A party against whom a claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

(d) . . . . When a motion for summary judgment is made and is supported as provided in this rule, an adverse party may not rest upon the mere allegations . . . of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT OF THE CASE

A. Introduction

Plaintiff-Respondents, Jerome and Peggy LaSalvia (LaSalvias), filed this antitrust suit against Petitioner, United Dairymen of Arizona (UDA) on March 31, 1980 for violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). They claimed that commencing in 1974 and continuing up until filing of their complaint they were damaged by UDA's unilateral refusal to buy their milk and a similar concerted refusal by Phoenix milk dealers caused by UDA's full supply contracts. After four years of discovery, the trial court granted UDA's motion for summary judgment, dismissing the action on statute of limitations grounds based on its determination that there was no genuine issue of material fact as to the finality of the refusals in May 1975.

The Court of Appeals for the Ninth Circuit reversed, holding that there was a material fact question relating to the finality of UDA's 1975 refusal; that the action is not barred

despite the finality of the refusal if Respondents suffered harm during the damage period stemming from the 1975 refusal and that Respondents' allegation of "continuing harm" continues the running of the statute, notwithstanding the absence of further overt acts by UDA during the limitation period.

B. Statement of Facts

Petitioner, United Dairymen of Arizona (UDA) is a cooperative association of dairy farmers. Jerome and Peggy LaSalvia (LaSalvias) operate an independent "non-member" dairy farm in Arizona. From 1955 until April of 1974 LaSalvias disposed of their entire daily milk production to Shamrock Foods, a Phoenix milk dealer, at the federally regulated "blend price" established by the United States Department of Agriculture. App. A. at A-3 n.2. Commencing in April 1974 and continuing thereafter, Shamrock reduced the amount of milk it was willing to accept from LaSalvias. LaSalvias' offer of their excess milk production to other Phoenix dealers and UDA was refused. App. C. at A-20-21. As a result, LaSalvias were forced to dispose of their excess production to other buyers outside of Arizona at a lower price. App. A. at A-11. App. B. at A-15.

On March 31, 1980, approximately six years after UDA's and the Phoenix milk dealers' initial refusal to buy their excess milk production, the LaSalvias commenced an antitrust action against UDA alleging that (1) commencing in the early 1960's UDA entered into full supply agreements with the Phoenix milk dealers except Shamrock which precluded LaSalvias from selling milk to those dealers—a concerted refusal to deal—and (2) unreasonably refused to purchase LaSalvias' excess milk—a unilateral refusal to deal in further-

ance of an unlawful monopolization of the market for the sale of raw milk to the Phoenix dealers. App. A. at A-2-3, 7; App. C. at A-20. They claimed as damages the difference between the Order 131 monthly established "blend price" they would have received by selling milk to a Phoenix dealer and the price they did receive by selling their milk out of Arizona plus "stunted growth" damages resulting from their foreclosure from the Phoenix market. App. A. at A-10; App. F. at A-56-59, 61-62, 66-68.

On August 22, 1983, following three years of discovery, UDA moved for summary judgment on the grounds that the refusals to deal of which the LaSalvias complained occurred no later than May 1975 and were, therefore, time barred under 15 U.S.C. § 15b. On November 10, 1983 the trial court (Hon. Carl A. Muecke, Chief Judge) denied UDA's motion on the grounds that there was a question of fact as to whether UDA's refusal to deal in 1975 was irrevocable and final. App. B. at A-18.

Following additional discovery, on June 24, 1984 UDA filed a renewed motion for summary judgment on the same statute of limitation grounds. On December 21, 1984 Judge Muecke granted UDA's renewed motion, noting in his Order that "there is no material issue of fact" (App. C. at A-20) that LaSalvias were aware in 1975 of UDA's final and "very emphatic" refusal and the refusal of the alleged conspiring milk processors to deal with plaintiffs (A-20-21), that "[p]laintiff[s] never contacted UDA between 1975 and the time the action was filed" in March 1980 and that subsequent "refusals by other processors were reaffirmations of the original refusal(s) to deal." App. C. at A-22-23. On the basis of the evidence disclosed by a massive four year discovery record, and the parties' respective statements of undisputed facts (A-20) the trial court found that:

> Plaintiffs themselves knew of and believed they had a cause of action in 1975 . . . [and] believed that UDA's and the other handlers' refusals to deal with them were final; this finding is supported by Plaintiffs' complaints to the Justice Department . . . during 1975 and Plaintiffs' own descriptions of their contacts with UDA.

App. C. at A-24.[1] The trial court noted further that LaSalvias' attorney's contemporaneous notes of a telephone conversation with UDA's attorney in April 1975 reflected the clear understanding that: "bottom line—won't take milk from non-member producer." App. C. at A-21. Following another request by LaSalvia and refusal by UDA's manager on May 23, 1975,[2] LaSalvias "never again directly contacted UDA about purchasing his milk until after this action was filed in 1980." App. C. at A-21.

Judge Muecke held that the LaSalvias' claims were barred by the Clayton Act's four year statute of limitations based upon the Ninth Circuit's holding in *Orgell v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981) that the statute begins to run upon an initial unequivocal refusal to deal and "that all refusals to deal subsequent to the

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[1] The trial court's "finality" finding was based on record evidence that following UDA's refusal in 1974 to buy LaSalvias' milk they complained to the United States Department of Agriculture that UDA was attempting to monopolize the raw milk market (A-20); on UDA's subsequent refusal in February 1975 conveyed by its attorney to LaSalvias' attorney (*ibid.*); LaSalvias' February 1975 press release complaining that neither UDA nor any dealer would buy his milk; Jerome LaSalvia's deposition testimony that he was told by UDA's manager in February 1975 never to call again (A-20-21), confirmed by Peggy LaSalvia as "very emphatic" (*ibid.*); LaSalvias' 1975 complaints to the Justice Department concerning UDA's unlawful monopoly (*ibid.*). *See* App. F. at A-30-55.

[2] LaSalvia's notes of the telephone call entered in his diary indicate: "9:30—Girard—no-no-no—". App. C. at A-21.

initial refusal [are] mere reaffirmations of the original decision not to deal" (App. C. at A-22) which will not restart the statute. He found, additionally, that "there were no unilateral refusals to deal by UDA during the limitations period, because Plaintiff never contacted UDA between 1975 and the time the action was filed"[3] (App. C. at A-22) and that "Plaintiffs . . . allege no overt affirmative acts on the part of UDA during the limitations period." *Id.* at A-24.

Responding to the argument based on *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 194 (9th Cir. 1956), that the continuing concerted denial by UDA and the milk dealers of Respondents' access to the market continued the accrual of their cause of action, the trial noted "that same case also states:

> '. . . in order to start the running of the statute of limitations there must be damage occasioned by an overt act. *In a continuing conspiracy causing* continuing damage without further overt acts, the *statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck.* Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run. Otherwise, in a continuing conspiracy, the cause of action would never fully develop, nor would there be any limitation upon the right of action,

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[3] Judge Muecke did not accept as worthy of consideration alleged "informal discussions between counsel for the parties at an unrelated legal meeting during 1977-78 as a contact between Plaintiffs and Defendants" (App. C. at A-22 n.1) but observed that in any case "these refusals are reaffirmations of the initial refusal(s)". *Ibid.*

> and the beneficent purpose of the statute to delimit the right to sue would be defeated.'

Steiner, supra, 232 F.2d at 195" (emphasis by the court).

> Here . . . there was no overt refusal to purchase Plaintiffs milk by UDA after 1975, because Plaintiffs never again directly approached UDA until after this action was filed in 1980. . . .
>
> . . . . While plaintiffs claim that other processors refused to deal with them because of their contract with UDA, they allege no overt affirmative acts on the part of UDA during the limitations period.

App. C. at A-23-24.

The Court of Appeals reversed. Although it acknowledged that "LaSalvias' testimony suggests that the 1975 refusal was in fact unequivocal" (App. A. at A-9), the Court found "[t]he evidence on the finality of UDA's refusal to deal . . . is ambiguous" (A-8) based upon the denial of UDA's manager that he told "Jerome LaSalvia in 1975 that LaSalvia was not to call again to request that UDA handle his excess milk production." App. A. at A-9. The Court concluded, therefore, that the trial court had improperly "resolved a material factual question [as to the finality of UDA's refusal] that would ordinarily go to the jury." *Ibid.* After noting that "the brief opinion in *Orgell* [on which the trial court relied] does not disclose the basis for its conclusion that the initial refusal was both final and the source of plaintiffs' injury" (App. A. at A-9), the Court concluded (*ibid.*):

> We therefore place on defendants the burden of showing that their initial refusal to deal was in fact final, and that the finality of the refusal was conveyed to the

> plaintiff. A self-serving allegation of finality made in the course of litigation is insufficient to meet this burden.[4]

The Court further held, however, that "[a] finding of finality on remand will not . . . resolve the § 15b question. . . . If damage accrued during the four years preceding the filing of the complaint, then the action is not barred despite the finality of the refusal." App. A. at A-10. The Ninth Circuit reversed the unilateral refusal "because plaintiffs allege damage *incurred* within the statutory period." *Ibid.* (Emphasis added.)

Finally, the Court held that irrespective of the absence of any overt acts on UDA's part during the limitations period, Respondents' action is not barred to the extent that they suffered "continuing harm" during the limitations period from UDA's alleged use of long term supply contract to maintain market dominance. The Court of Appeals relied for that conclusion on this Court's holding in *Hanover Shoe Co. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968) which, according to the Ninth Circuit, "established a limited exception to the usual rule that an antitrust claim accrues when the plaintiff incurs injury". App. A. at A-11. Though the absence of an overt act during the limitation period is uncontroverted, the trial court's error, according to the Court of Appeals, was in:

> refus[ing] to apply the continuing harm doctrine, looking instead to the time the LaSalvias learned of the full

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[4] If the reference to a "self serving allegation" is to the denial by UDA's manager of what he told LaSalvia, the "self serving allegation" relates to a denial of liability, not an "allegation of finality" of the refusal. If the "self serving allegations" are those of the LaSalvias, they are admissions as to the finality of the refusal and "self serving" only as to the merits of their claim.

> supply contracts. Because the relevant inquiry is not when they learned of the contracts but whether the harm alleged continued into the four-year period preceding the filing of the complaint, the summary judgment on the concerted refusal to deal claim is reversed.

Id. at A-12.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS "GENUINE ISSUE OF MATERIAL FACT" STANDARD IS INCONSISTENT WITH THE STANDARD FOR SUMMARY JUDGMENT UNDER RULE 56(c) AS ARTICULATED BY THIS COURT.

In *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S.Ct. 2505, 2510 (1986) this Court noted that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (Emphasis by the Court). In *Celotex Corp. v. Catrett*, —— U.S. ——, 106 S.Ct. 2548, 2550 (1986) the Court held that the plain language of Rule 56(c), Fed.R. Civ.P., mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to come forward with evidence essential to that party's case and that there is nothing in Rule 56 that requires the moving party to negate the opponent's claim.

The basis of Respondents' antitrust action is the claim that UDA's refusal to deal in 1975 was unlawful because it was in furtherance of a monopoly—a claim which UDA denied. The finality of that refusal is an issue separable from the merits and is relevant only to the statute of limitations issue.

The Court of Appeals Opinion elides the distinction between Petitioner's denial addressed to the "immaterial" issue of UDA's unlawful conduct and the "material" fact issue of UDA's unequivocal refusal to deal as established by Respondent's allegations and admissions.

It defies logic and common sense to hold, as the Court of Appeals did here, that a plaintiff who alleges as part of his claim on the merits that the defendant has firmly, finally and unlawfully refused to deal, may raise a "genuine" issue of "material" fact as to that finality on the basis of the defendant's denial of the allegation. *See Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Limited,* 185 F.2d 196, 205-206 (9th Cir.) *cert. denied,* 340 U.S. 943 (1950).

The Court of Appeals decision is the product of the Ninth Circuit's uniform rule that a grant of summary judgment is reviewed *de novo,*[5] irrespective of the issue or the extent of the discovery record, and that findings by a trial judge in a summary judgment proceeding are not entitled to deference upon review. *Heiniger v. City of Phoenix,* 625 F.2d 842, 843 (9th Cir. 1980). The Ninth Circuit's uniform and consistent refusal to defer to a trial judge's summary judgment findings " 'undermines the traditional authority of trial judges to grant summary judgment in meritless cases.' " *Celotex Corp., supra,* 106 S.Ct. at 2552, quoting *Catrett v. Johns-Manville Sales Corp.,* 756 F.2d 181, 187 (D.C. Cir. 1985) (Bork, J., dissenting). Where a trial judge has granted a moving party's Rule 56(c) motion on the basis of a fully developed discovery record

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[5] See, e.g. *O.S.C. Corporation v. Apple Computer, Inc.,* 792 F.2d 1464, 1466 (9th Cir. 1986); *Loehr v. Ventura County Community College District,* 743 F.2d 1310, 1313 (9th Cir. 1984); *Martino v. Santa Clara Valley Water District,* 703 F.2d 1141, 1145 (9th Cir.) *cert. denied,* 464 U.S. 847 (1983); *Lew v. Kona Hospital,* 754 F.2d 1420, 1423 (9th Cir. 1985).

and the *opposing* party's version of the facts, there can be "no genuine issue of material fact" because what the moving party asserts is immaterial. Where the plaintiff's pleadings or testimony admits a material fact determinative of a legal issue that defeats his claim, that admission simply removes from the case any question concerning the existence of a genuine material fact issue. *Cf. Catrett, supra,* 756 F.2d at 190 (Bork, J., dissenting).

Review should be granted in this case to remind the federal judiciary that Rule 56(c) coupled with Rule 43(e),[6] where appropriate, provides an efficient, effective and fair means of processing and disposing of affirmative defense and other separable issues without the attendant costs in time and energy to litigants and the judicial system necessarily associated with a jury trial. *See Argus, Inc. v. Eastman Kodak Co.,* 801 F.2d 38, 42 n.2 (2d Cir. 1986), *cert. denied,* 55 U.S.L.W. 3569 (U.S. Feb. 24, 1987) (No. 86-949); *State of Utah v. Marsh,* 740 F.2d 799, 801 n.2 (10th Cir. 1984); 5 *Moore's Federal Practice,* ¶43.13 (1985); 10A C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure,* § 2723, p. 61 (1983); *cf. Exchange National Bank of Chicago v. Touche Ross & Co.,* 544 F.2d 1126, 1130-31 (2d Cir. 1976); *Akron Presform Mold Company v. McNeil Corporation,* 496 F.2d 230, 235 (6th Cir.), *cert. denied,* 419 U.S. 997 (1974).

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[6] Rule 43(e), Fed.R.Civ.P. provides: "When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct the matter be heard wholly or partly on oral testimony or deposition."

2. AN ILLEGAL UNILATERAL OR CONCERTED REFUSAL TO DEAL CREATES A CAUSE OF ACTION WHEN IT OCCURS AND IS NOT RESTARTED BY REPEATED REQUESTS WHICH THE DEFENDANT REFUSES.

The Court of Appeals characterized as "ambiguous" the trial court's holding based on *Orgell, supra*, "that any refusal to deal subsequent to an initial refusal is a mere reaffirmation, and thus the Clayton Act's statute of limitations runs from the initial refusal." App. A. at A-7. The Opinion appears to hold that unless the initial refusal to deal is " 'irrevocable, immutable, permanent and final,' " (App. A. at A-7) the initial refusal which inflicts damage[7] does not prevent the later accrual of a cause of action either from the reaffirmation of the refusal or its mere continuance.

That holding is in conflict with the general rule that a cause of action arises upon an initial unlawful refusal to deal which causes damage and that a subsequent refusal, or its mere continuance, does not give rise to new causes of action because they are not "overt acts" which cause new injury. *Garelick v. Goerlich's, Inc.*, 323 F.2d 854, 856 (6th Cir. 1963) ("the [subsequent] incidents were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants); *accord, Baker v. Chagrin Valley Medical Corp.*, [1985-1] Trade Cas. ¶66,622, p. 66,099; *Trepel v. Pontiac Osteopathic Hospital*, 599 F. Supp. 1484, 1490 (E.D.

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[7] There is no question in this case concerning the existence of ascertainable damages suffered by Respondents in 1974 and 1975 from the alleged unlawful refusals to deal measured by "the price differential between the Order 131 price available if they could have sold their total production within the CAMMA, and the lower price they received by selling milk in other markets." App. A. at A-10. Those damages were computed by Respondents each month as they occurred. See App. F. at A-66-68.

Mich.) (1984); *Chapa v. Volkswagen of America, Inc.*, [1974-1] Trade Cas. ¶74,911, p. 96,091 (D.D.C. 1974); *Southeastern Hose, Inc. v. Imperial-Eastman Corp.*, [1973-1] Trade Cas. ¶74,479 (N.D. Ga. 1973); *Saunders v. National Basketball Ass'n.*, 348 F. Supp. 649, 652-53 (N.D. Ill. 1972); *Ansul Co. v. Uniroyal, Inc.*, 306 F.Supp. 541, 569 (S.D. N.Y. 1969) *aff'd in part and rev'd in part on other grounds*, 448 F.2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); *Manok v. Southeast District Bowling Association*, 306 F. Supp. 1215, 1221 (C.D. Cal. 1969); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 197 F. Supp. 333, 338 (N.D. Ala. 1960), *aff'd*, 295 F.2d 362, 363 (5th Cir. 1961). See II P. Areeda & D. Turner, *Antitrust Law*, ¶325b at 121 (1978) ("An illegal refusal to deal . . . creates a cause of action when it occurs. But the courts do not generally allow the plaintiff perpetually to restart the limitations period merely by repeated requests which the defendant refuses").

There is conflicting authority, however. The Fourth, Fifth and Eighth Circuits have held that a reiterated request following an unlawful refusal to deal may give rise to a new cause of action permitting the plaintiff to sue within four years of the latest refusal. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 572 (4th Cir. 1976); *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 124-128 (5th Cir.), *reh'g denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir.) *cert. denied*, 434 U.S. 859 (1977); *Pioneer Co. v. Talon, Inc.*, 462 F.2d 1106, 1108 (8th Cir. 1972).[8] For the subsequent

[8] The Eleventh Circuit holds that a reiterated request following an initial refusal is an overt act that will restart the statute of limitations unless "plaintiffs' subsequent requests were futile and plaintiffs had reason to know they were futile . . ." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 715 (11th Cir. 1982).

refusal to constitute an "overt act" to restart the statute, however, the Fourth and Fifth Circuits both require that the initial refusal must not have been irrevocable and there must have been a request and refusal during the four year period and not "a mere absence of dealing." *Poster, supra,* 517 F.2d at 128; *see also, Mangurian, supra,* 549 F.2d at 1035.

In requiring a defendant to show that its initial refusal was "irrevocable, immutable, permanent and final" (App. A. at A-7) in order to invoke the statute of limitations bar to a subsequent request and refusal, the decision below appears to align the Ninth Circuit with the Fifth Circuit on the issue of when the statute commences to run in a refusal to deal case, except that for the Ninth Circuit, a mere continued "absence of dealing" is enough to create a continuing cause of action unless the initial refusal is "irrevocable."

A requirement that a refusal to deal be "irrevocable [and] immutable" to commence the running of the statute "would effectively destroy the statute of limitations as a statute of peace." *Garelick v. Goerlich, supra,* 323 F.2d at 856. No talismanic words or acts of "irrevocability" should be needed to convey finality in a refusal to deal context. Businessmen who refuse to deal are not in the habit of telling suppliers or buyers: "I will not deal with you now or ever in the future." No such statement of "irrevocability" was required in any of the cases cited under the *Garelick* rule, *supra.*

The division among the circuits, as disclosed by the above cases, undermines the objectives sought by Congress in its 1955 adoption of a uniform statute of limitations for cases arising under the antitrust laws by perpetuating the "confusion" at which the law was aimed. *See* S. Rep. No. 619, 84th Cong. 1st Sess. at 5 (1955); H.R. Rep. No. 422, 84th Cong. 1st Sess. at 7 (1955); M. Wheeler and R. Jones, *The Statute of Limitations for Antitrust Damage Actions: Four Years or*

Forty? 41 U. Chi. L. Rev. 72, 82-83. The decision below adds further confusion to the existing conflict among the circuits as to when a cause of action arises under § 4B of the Clayton Act by eliminating the "request and the refusal" requirements of the Fourth and Fifth Circuit rules.

Review of the Court of Appeals decision in this case should be granted to resolve the conflict among the circuits by reversing the decision and approving the Sixth Circuit rule that "[a]n illegal refusal to deal . . . creates a cause of action when it occurs . . . [and is not] restart[ed] . . . merely by repeated requests which the defendant refuses." Areeda & Turner, *supra.*

3. THE COURT OF APPEALS' HOLDING THAT A CAUSE OF ACTION ACCRUES FROM CONTINUING DAMAGE WITHIN THE STATUTORY PERIOD CAUSED BY PRELIMITATION CONDUCT WITHOUT FURTHER OVERT ACTS WITHIN THE LIMITATION PERIOD IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND ALL OTHER CIRCUITS.

There is no suggestion in the decision below that the trial court was wrong when it found that "there were no unilateral refusals to deal by UDA during the limitation period" (App. C. at A-22) and "no clear cut allegations or evidence of overt acts by . . . UDA during the limitations period." *Id.* at A-24. The decision holds, nonetheless, that "despite the finality of the refusal" (App. A. at A-10) and the absence of an overt act during the limitation period, reversal was required because "plaintiffs allege damage incurred within the statutory period" (*ibid.*), citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

In *Zenith*, this Court explained that:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. *See, e.g., Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196, 208 (CA-9 1950). . . . This much is plain from the treble-damage statute itself. 15 U.S.C. § 15. In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured *by an act* of the defendants a cause of action accrues to him to recover the damages caused *by that act* and that, as to those damages, the statute of limitations runs from the commission of the act. *See, e.g., Crummer Co. v. Du Pont*, 223 F.2d 238, 247-248 (CA-5 1955). . . . However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. . . . Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action.

401 U.S. at 338-39 (emphasis supplied) (citations omitted). In *Suckow*, the Ninth Circuit held that in a "continuing conspiracy" the statute runs from the last "overt act" causing damage; not from continuing damage stemming from the act.

185 F.2d at 208 ("the only actions . . . not . . . barred . . . would be those arising from damages, caused by illegal *'overt acts'* which occurred *within* the three year period immediately preceding [commencement of the action]") (emphasis by the Court).[9]

It is obvious not only from the plain language of *Zenith*, but from the cases cited by the Court that the words "by an act" of defendants means exactly that—i.e. by "successive unlawful acts and consequent damage . . . caused by such acts." *Crummer Co. v. Du Pont*, 223 F.2d at 247. *Zenith* stands for the proposition that:

> [C]ontinuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action. It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable, but unabated inertial consequences of some pre-limitations action.

Poster Exchange, Inc. v. National Screen Serv. Corp., supra, 517 F.2d at 128. *See also National Souvenir Center v. Historic Figures, Inc.*, 728 F.2d 503, 509 (D.C. Cir. 1984) ("For their action to survive, plaintiff-appellants had to show an 'overt act' pursuant to the . . . tying arrangement by appellees within the limitation period. . . ."); *Barnosky Oils, Inc. v. Union Oil Co. of Calif.*, 665 F.2d 74, 81 (6th Cir. 1981) (continuing damage resulting from a "mere absence of dealing" during the limitations period does not give rise to a cause of action); *Electro Glass v. Dynatex Corp.*, 497 F. Supp. 97, 105 (N.D. Cal. 1980) (in a continuing violation causing continuing harm, the statute runs from the last overt act causing damage,

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[9] The statutory three year limitations period was extended by the Federal Moratorium Act. 185 F.2d at 208.

not from continuing damage from prelimitation conduct); *Fontana Aviation v. Baldinelli*, 418 F. Supp. 464, 468 (W.D. Mich. 1976), *aff'd per curiam*, 575 F.2d 1194 (6th Cir.), *cert. denied*, 439 U.S. 911 (1978) ("the period of limitation is not extended merely because damages from the injury may be continuing").

The Ninth Circuit's holding that Respondents' action was not barred despite the absence of an overt act by UDA after 1975 because "plaintiffs allege damage incurred within the statutory period" (App. A. at A-10) is plainly wrong. There is no *Zenith* problem here concerning "speculative damages" preventing the accrual of a cause of action (App. A. at A-7, n.6), nor is there any question concerning Respondents' ascertainable damages in 1974 and 1975 when they were incurred as a result of Petitioner's and the milk dealers' refusal to buy Respondents' milk. App. C. at A-25. The "source and timing" (App. A. at A-10) of Respondents' damages were fixed in 1975 when their milk was refused and they shipped it out at a lower price. At that point, a cause of action "immediately accrue[d] . . . to recover all damages incurred by that date and all provable damages that [would] flow in the future from the acts of the conspirators on that date. To recover those damages, [Respondents] must [have] sue[d] within the requisite number of years from the accrual of the action." *Zenith, supra*, at 339.

Zenith holds that in a continuing violation "[i]f a plaintiff which has begun to suffer [ascertainable] damage allows four years to go by without suit it will be barred as to any damages past or future—which it might have proved had it brought suit during the four year period." L. Sullivan, *Handbook of the Law of Antitrust* (1977) at 776. Acceptance of the Ninth Circuit's theory that the mere incurrence of continuing damage from prelimitation conduct without further overt acts keeps the statute running "would effectively destroy the stat-

ute of limitations as a statute of peace." *Crummer Company v. Du Pont, supra,* 223 F.2d at 248. Review should be granted to reverse the decision below in order to remove the conflict and confusion in the law which it has created as to when a cause of action under § 4B of the Clayton Act arises and the four year statute of limitations begins to run.

4. THE NINTH CIRCUIT'S *HANOVER SHOE* "EXCEPTION" TO WHEN A CAUSE OF ACTION ACCRUES MISAPPLIES THE HOLDING AND REASONING OF THAT CASE.

The decision below states that *Hanover Shoe Co. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968):

> established a limited exception to the usual rule that an antitrust claim accrues when the plaintiff incurs the injury. The *Hanover Shoe* exception applies when the anticompetitive conduct complained of constitutes a continuing violation and results in continuing harm. In that case, overcharges paid by the plaintiff because of the defendant's lease-only policy . . . resulted from a 'continuing violation of the Sherman Act' which inflicted 'continuing and accumulating harm' on the plaintiff.

App. A. at A-11. There is nothing "exceptional" about the holding in *Hanover.* Hanover's suit in 1955 based on the "impact of . . . United's lease only policy" which began in 1912 (392 U.S. at 502 n.15) was not time-barred because each collection of rents under United's unlawful "lease only" policy was an "overt act" causing new damages, "not a mere continuation of a refusal to sell." *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 377 F.2d 776, 794 (3d Cir. 1967). As explained in II Areeda and Turner, *supra,* at 120 (citations omitted):

> In the case of a continuing violation, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again. For example, so long as an illegal price fixing conspiracy is alive, each sale at the fixed price would have that effect. Similarly, an illegal lease-only policy was held in . . . *Hanover* . . . to create a cause of action every time the defendant leased and . . . refused to sell.

The Third Circuit's decision in *Hanover*, affirmed by the Supreme Court, makes the point explicitly. Distinguishing cases such as *Garelick v. Goerlich's, Inc., supra*, the court explained:

> [I]n the cited cases the continuing conduct was that of a mere re-assertion of the refusal to deal. Here, however, United went beyond a mere continuation of the refusal to sell; it collected rentals on leases and entered into new leases when old machinery was no longer in working condition and required replacement.

377 F.2d at 794. Hanover's suit was not barred because United Shoe's continued "lease only" policy which began in 1912 inflicted injury and damages on Hanover "in 1955 by concrete and specific business transactions." *Id.* at 795.

Here, in contrast, there is only absence of dealing by Petitioner and "mere continuation of the refusal to sell" by the milk dealers during the limitation period. But "mere absence of dealing" is not an overt act that will give rise to a cause of action. *Poster Exchange, supra,* 517 F.2d at 128 ("Poster . . . is obliged to demonstrate some act of the defendants during the limitation period foreclosing or interfering with its access to supplies"). The absence from this record of "the occurrence of any specific act or word [by Petitioner] denying

[Respondents] . . . access to [the market] during the statutory period" (*id.* at 129) supported the trial court's entry of judgment against Respondents dismissing the action on statute of limitation grounds.

The decision below is squarely at odds with this Court's holding in *Zenith* and *Hanover* that under § 4B of the Clayton Act, an antitrust action is barred unless it is commenced within four years of the illegal overt act which is alleged to have caused plaintiff's damage. The writ should be granted to remove the conflict created by the decision below on an issue of importance to the enforcement of the antitrust laws.

CONCLUSION

For the foregoing reasons, United Dairymen of Arizona submits that the writ of certiorari should be granted.

Dated: April 20, 1987.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A
FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1592
D.C. No. Cv 80-252 PHX CAM

JEROME LaSALVIA and PEGGY LaSALVIA,
husband and wife,
Plaintiffs-Appellants,

v.

UNITED DAIRYMEN OF ARIZONA, an Arizona marketing association; ROBERT M. GIRARD; and LEONARD F. CHEATHAM,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the District of Arizona
Carl A. Muecke, District Judge, Presiding
Argued and submitted February 10, 1986
Decided November 21,1986
San Francisco, California

Before: GOODWIN, HUG and REINHARDT, Circuit Judges.

GOODWIN, Circuit Judge:

Jerome and Peggy LaSalvia, operators of an independent dairy farm in Laveen, Arizona, appeal the dismissal of their antitrust claims against defendants United Dairymen of Arizona ("UDA"), a dairy farmers' cooperative, Robert Girard, its general manager, and Leonard Cheatham, its president

until 1983. Both the LaSalvias and UDA produce milk within the U.S. Department of Agriculture's Central Arizona Milk Marketing Area ("CAMMA"). The district court excluded evidence of several of the LaSalvias' allegations on the grounds that the LaSalvias lacked standing to challenge the conduct alleged.[1] The court then granted summary judgment for the defendants on the grounds that the LaSalvias' remaining claims were time-barred under 15 U.S.C. § 15b (1982). The court also denied a motion for leave to file an amended complaint. We reverse and remand for further proceedings.

The LaSalvias sued UDA for violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (1982), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1982). Their complaint alleged that UDA, beginning shortly after its formation in 1959, had monopolized and attempted to monopolize the marketing of Grade A raw milk in the CAMMA, and that UDA had conspired to restrain trade with area raw milk processors ("handlers"). Plaintiffs cite six practices to support their claims:

1. UDA's entering into full supply contracts with handlers and discriminating against handlers unwilling to enter into such contracts (the concerted refusal to deal claim);

2. UDA refused to purchase plaintiffs' excess fluid milk for processing into storable form until after this action was

[1] Although the district court characterized the issue as one of "standing," in order to avoid confusion between "antitrust standing" and "constitutional standing," we treat the issue as one of whether plaintiffs were proper parties to challenge defendants' allegedly anticompetitive conduct. *Exhibitors' Service, Inc. v. American Multi-Cinema, Inc.*, 788 F.2d 574, 576 n.1 (9th Cir. 1986). *See Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983).

filed (the unilateral refusal to deal claim), and then paid them a price below the Order 131 blend price;[2]

3. UDA gave rebates to handlers;

4. UDA adopted and enforced a "base plan" system for calculating its members' monthly milk payments that included overly restrictive covenants not to compete;[3]

5. UDA entered into reserve and pooling agreements with out-of-state cooperatives, and;

6. UDA acquired control of raw milk transportation in the CAMMA.

The district court granted UDA's motion to exclude from trial evidence of its base plan, its rebates to handlers, and its acquisition of milk transportation facilities on the grounds that the LaSalvias were not proper parties to challenge this conduct. The court also excluded evidence of UDA's marketing agreements with other cooperatives, its purchase of other producer-handler operations, and its refusal to process the

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[2] Milk is marketed in the CAMMA pursuant to Federal Milk Marketing Order 131, which establishes through a statutory and regulatory scheme three classes of milk and the minimum price to be paid to producers for each class. *See* 7 U.S.C. § 601 et seq. (1982); 7 C.F.R. Part 1131 (1984). Both plaintiffs and UDA are termed "producers" under the USDA's regulations. 7 C.F.R. § 1131.12 (1984). Their milk is sold to handlers for processing. 7 C.F.R. §§ 1131.7, 1131.9 (1984). Producers receive a "blend price" for milk marketed pursuant to Order 131. The blend price is a weighted average of the prices for the three classes of milk.

[3] UDA's base plan was a means of countering the incentive for overproduction provided by the combined effect of a guaranteed minimum price and the small impact an individual farmer's production has on the cooperative's total output. Rather than allocating the blend price according to the amount shipped per month by each member, UDA pays the Order 131 blend price only for the amount of base allocated to the member. Amounts produced in excess of the member's base are paid for at a lower rate. Thus, the member's "personal blend price" falls as his or her production over base increases. This arrangement is lawful under 7 U.S.C. § 608c(5)(F) (1982).

milk of other producer-handlers on the grounds that these allegations were not included in the complaint.[4]

I. The Exclusion of Evidence Under Rule 16

Section four of the Clayton Act, 15 U.S.C. § 15(a) (1982), affords a private action for damages to "any person who shall be injured in his person or property by reason of anything forbidden in antitrust laws." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and its progeny limit section four's scope to those plaintiffs who have sustained the type of injury that the antitrust laws were meant to remedy. In *Brunswick*, the Court concluded that a competitor seeking to enjoin a potentially procompetitive merger was not a proper party to sue under the antitrust laws. *Brunswick* thus requires that the conduct alleged be harmful to the competitive process, and not merely to a given competitor. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the Court relied on a remoteness analysis to grant a consumer standing to challenge a conspiracy to exclude psychologists from the health care market. *McCready* looked to two factors in assessing whether the plaintiff was a proper party to challenge the defendants' conduct. First, it cited *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which required that the plaintiff be directly injured by the anticompetitive conduct. 457 U.S. at 473-78. Second, it looked to the *Brunswick* competitive harm requirement. *Id.* at 478-79.

In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court set out the factors to be considered in determining whether a plaintiff is the proper party to challenge given conduct. Although a plaintiff must allege harm to himself from the defendant's

[4] Plaintiffs do not raise on appeal the allegations regarding the purchase of other producer-handlers and the refusal to process the milk of others.

anticompetitive conduct, this does not, standing alone, bring the plaintiff within section four's reach. *Id.* at 537.

We recently summarized the *Associated General Contractors'* factors as follows:

> "[T]he nature of plaintiff's injury, the directness or indirectness of the asserted injury, the potential for duplicative recovery or complex apportionment of damages, the speculative nature of damages asserted, and the existence of more direct victims of the alleged violation are factors a court must consider when making the 'proper party' determination."

Exhibitors' Service, Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 578 (9th Cir. 1986).

The LaSalvias undoubtedly are proper parties to challenge UDA's allegedly anticompetitive conduct. As one of UDA's remaining competitors in the CAMMA, they meet the directness requirement, and they have an incentive vigorously to seek redress for the harms caused by any exploitation by UDA of its market position. Plaintiffs allege that the base plan, the rebates to handlers, and the acquisition of the transport facilities were employed in an unlawful quest for market dominance. The harm alleged is thus precisely the sort that the antitrust laws were intended to remedy.

We reject defendants' argument that because the LaSalvias have not alleged harm from the allegedly monopolistic practices they lack constitutional and antitrust standing. The LaSalvias have alleged unlawful monopolization and attempted monopolization, and are entitled to set forth the practices they believe UDA used in an effort either to obtain monopoly power or to exploit it. Rather than giving rise to liability independently, the allegedly unlawful practices serve an evidentiary function. *See Ostrofe v. H. S. Crocker Co.*, 740 F.2d 739, 743 (9th Cir. 1984), *cert. dismissed* 105 S. Ct. 1155 (1985)

(evidence of a price-fixing conspiracy admissible as probative of the existence of a second related conspiracy). Lastly defendants' theory that their questioned practices are lawful go to the merits of plaintiffs' claim, which are not before this court.[5]

The district court, in excluding the evidence of the base plan, the rebates, and the integration of milk transportation facilities, confused the prudential limitations on private antitrust actions with the requirements of damage-in-fact and causation. The court based the exclusion upon the LaSalvias' purported failure to show injury independent of that resulting from the alleged refusals to deal. This concern goes not to the limitation on private antitrust suits, but to a perceived failure of the LaSalvias' proof to show damage from the questioned practices. The district court's exclusion of the evidence of the UDA base plan, its rebates to handlers, and its acquisition of milk transportation facilities requires reversal of the judgment.

We also note that the court's exclusion of the evidence of UDA's marketing agreements with other cooperatives was error. Under the federal rules a plaintiff need not allege every act he or she intends to prove in support of the claim for relief. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). *See also* 2A J.W. Moore & J.D. Lucas, *Moore's Federal Practice* ¶ 8.03 (2d ed. 1983).

II. The Grant of Summary Judgment on the Refusal to Deal Claims

The district court concluded that the Clayton Act's four-year statute of limitations, 15 U.S.C. § 15b (1982), barred

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[5] We thus need not address at this stage whether the UDA's actions may be legal pursuant to the Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1982).

both the unilateral and concerted refusal to deal claims. Plaintiffs filed the complaint on March 31, 1980. The court found that UDA did not unilaterally refuse to deal with plaintiffs within the four preceding years. It also found that the concerted refusal to deal claim stemmed from contracts entered into between UDA and other Arizona handlers as early as 1960, and that plaintiffs were aware of these contracts before the end of 1975.

We review grants of summary judgment de novo, and like the district court apply Federal Rule of Civil Procedure 56. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). We reverse as to both claims.[6]

A. The Unilateral Refusal to Deal Claim.

The district court relied upon *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981), in granting summary judgment for defendants on the LaSalvias' unilateral refusal to deal claim. The court's treatment of *Orgell* is ambiguous. Defendants understand the district court's view to be that any refusal to deal subsequent to an initial refusal is a mere reaffirmation, and thus the Clayton Act's statute of limitations runs from the initial refusal. *Orgell*, however, merely applies *AMF, Inc. v. General Motors Corp. (In re Multidistrict Vehicle Air Pollution)*, 591 F.2d 68 (9th Cir. 1979) (*Air Pollution*), *cert. denied*, 444 U.S. 900 (1980). *See Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1301 (9th Cir. 1986). In *Air Pollution*, we held that because the defendants' initial refusal to deal was "irrevocable, immutable, permanent and final," any harm necessarily re-

[6] Because we reverse on other grounds, we do not reach the LaSalvias' argument that the speculative damages doctrine, *see Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971), applies to their refusal to deal claims.

sulted from the initial refusal and not from subsequent reaffirmations. 591 F.2d at 72. Because the plaintiff in that case was not injured by the defendants' subsequent conduct, the statute of limitations ran from the initial refusal. Rather than stating a per se rule governing repeated refusals to deal, *Air Pollution* and *Orgell* merely apply the usual rule that antitrust claims accrue when the plaintiff incurs the injury. *Zenith Radio Corp. v. Hazeltine Research Corp.*, 401 U.S. 321, 338 (1971). *See Western Shoe Gallery, Inc. v. Duty Free Shoppers, Ltd.*, 593 F. Supp. 348, 352 n.4 (N.D. Cal. 1984).

At issue therefore is the finality of UDA's refusal to handle the LaSalvias' excess production, and the source of the harm allegedly inflicted by defendants upon them.

Plaintiffs argue that a material question of fact exists as to whether UDA's refusal to accept its milk for handling in 1975 was final, and that summary disposition of the unilateral refusal claim was thus error. They cite the deposition testimony of defendant Girard, UDA's general manager, regarding his 1975 refusal to accept plaintiffs' milk. They also rely upon their allegation, supported by affidavit and denied by UDA's counsel, that in 1977 and 1978 their attorney again requested access to UDA's manufacturing facility. Lastly, they argue that UDA's acceptance in 1981 of their milk for processing cuts against any finding that the 1975 refusal was final. In response, defendants argue that if plaintiffs' characterization of Girard's statement is true, then no illegal refusal to deal occurred and they should prevail on the merits. They also cite deposition testimony by plaintiffs suggesting that UDA's initial refusal was unequivocal.

The evidence on the finality of UDA's refusal to deal with the LaSalvias is ambiguous. On the one hand, Girard's testimony can be read to give plaintiffs some hope that UDA would

relent, and thus accept their milk for processing. He expressly denied telling Jerome LaSalvia in 1975 that LaSalvia was not to call again to request that UDA handle his excess production. Gerard stated that during this conversation he informed LaSalvia that if UDA later had the capacity to handle plaintiffs' milk, it would so inform him. On the other hand, the LaSalvias' testimony suggests that the 1975 refusal was in fact unequivocal.

The district court, in concluding that UDA's 1975 refusal was final and subsequent denials were mere reaffirmations, thus resolved a material factual question that would ordinarily go to the jury. Because summary disposition is allowed only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c), the court should not have granted summary judgment on the unilateral refusal to deal claim.

The initial refusal to deal in *Air Pollution* was necessarily final because the product, if it was to be used at all, had to be integrated into the design of new automobiles. 591 F.2d at 72. Therefore, finality was easily assessed because it turned upon a peculiarity of the product market at issue and not upon the subjective intent of the defendants. By contrast, the brief opinion in *Orgell* does not disclose the basis for its conclusion that the initial refusal was both final and the source of the plaintiff's injury. *Orgell* may encourage ambiguous responses to requests to deal coupled with later allegations that those denials were final. We therefore place on defendants the burden of showing that their initial refusal to deal was in fact final, and that the finality of the refusal was conveyed to the plaintiff. A self-serving allegation of finality made in the course of litigation is insufficient to meet this burden.

A finding of finality upon remand will not, of course, conclusively resolve the § 15b question. Under *Air Pollution* and *Orgell*, the district court must also determine whether the damage to plaintiff, if any, resulted solely from the initial refusal. If it did not, and damage accrued during the four years preceding the filing of the complaint, then the action is not barred despite the finality of the refusal. Plaintiffs' damage analysis claimed losses both from the failure of their business to grow as projected, and the price differential between the Order 131 price available if they could have sold their total production within the CAMMA, and the lower price they received by selling milk in other markets. Under this damage theory, plaintiffs claim harm from UDA's exploitation of its market position. The losses claimed in plaintiffs' damage analysis stem not from the initial refusal, but from the unlawful monopolization of the market at issue.

Because the district court resolved a material question of fact, and because the record suggests that plaintiffs allege damage incurred within the statutory period, the summary judgment on plaintiffs' unilateral refusal to deal claim must be reversed. Because the district court addressed only the finality question, we cannot determine whether the parties had an opportunity to address the source and timing of the damage question. They should be afforded that opportunity upon remand.

B. The Concerted Refusal to Deal Claim

Because *Air Pollution* involved a concerted refusal to deal, its analysis arguably should also govern the LaSalvias' concerted refusal claim. We decline to apply it, however, because of the fundamental differences in the conduct underlying the concerted refusal claims in *Air Pollution* and in this case. The plaintiff in *Air Pollution* alleged a group boycott. Such con-

duct is analytically indistinguishable from a unilateral refusal for statute of limitations purposes. In most instances the harm incident to such refusals stems from the refusal itself. Continuing harm is not at issue, and thus the finality of the refusal will usually determine the triggering of the statute of limitations. In this case plaintiffs allege use of long-term contracts to achieve or to maintain market dominance. The harm alleged stems from the exploitation of market dominance to deprive plaintiffs of an opportunity to market their milk within the CAMMA. Thus, finality is not at issue. Rather than looking to *Air Pollution*, we therefore look to the Supreme Court's continuing harm analysis.

In *Hanover Shoe Co. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Court established a limited exception to the usual rule that an antitrust claim accrues when the plaintiff incurs the injury. The *Hanover Shoe* exception applies when the anticompetitive conduct complained of constitutes a continuing violation and results in continuing harm. In that case, overcharges paid by the plaintiff because of the defendant's lease-only policy for its shoe manufacturing machinery resulted from a "continuing violation of the Sherman Act" which inflicted "continuing and accumulating harm" on the plaintiff. *Id.* at 502 n.15. The plaintiff alleged that the defendant, by exploiting its monopoly power, inflicted a continuing loss on the plaintiff through the use of damaging contracts. The LaSalvias allege that UDA has used its market position to impose contracts on handlers within the CAMMA that prohibited them from dealing with plaintiffs. That the contract in *Hanover Shoe* was between the parties to the suit and those here were between UDA and third parties does not lessen the force of the continuing harm analysis. In *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264,

1270 (9th Cir. 1975), we relied upon *Hanover Shoe* in concluding that the purchaser of a sports franchise could challenge a long-term exclusive supply contract between a former owner of the franchise and a concessionaire even though the contract was formed more than four years before suit was filed.

The district court in this case refused to apply the continuing harm doctrine, looking instead to the time the LaSalvias learned of the full supply contracts. Because the relevant inquiry is not when they learned of the contracts but whether the harm alleged continued into the four-year period preceding the filing of the complaint, the summary judgment on the concerted refusal to deal claim is reversed. We note, however, that while plaintiffs may recover for damages they prove were caused by anticompetitive conduct begun before the four-year statutory period under the continuing harm doctrine, their recovery is limited to damage incurred within the four years preceding the filing of the complaint. *See Hanover Shoe*, 392 U.S. at 502 (plaintiff entitled to damages "for the entire period permitted by the applicable statute of limitations") (footnote omitted); *cf. Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1361 (9th Cir. 1976) (limiting damages to the statutory period under the speculative damages doctrine), *cert. denied*, 429 U.S. 1074 (1977).

III. The Denial of Plaintiffs' Motion for Leave to File an Amended Complaint

Plaintiffs sought to amend their complaint in October 1984, to allege post-complaint injury. The district court denied the motion on the grounds that they had known of the conduct alleged since 1981, that the new allegation was a disguised challenge to UDA's base plan, and that amendment would require the reopening of discovery. We review the denial for

abuse of discretion. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). We conclude that the district court abused its discretion in denying the motion for leave to amend.

Federal Rule of Civil Procedure 15(d) allows the addition of post-complaint allegations. Motions to amend pursuant to Rule 15(d) should be granted "[u]nless undue prejudice to the opposing party will result." *Howey*, 481 F.2d at 1190. We see no prejudice to defendants in allowing the amendment. Because most of the information on the added claim would be available in UDA's own files, little additional discovery would be needed. Defendants rely upon *Waters v. Weyerhaeuser Mortgage Co.*, 582 F.2d 503, 506-07 (9th Cir. 1978), in arguing that because plaintiffs could have sought amendment at an earlier date and because discovery would have to be reopened if the motion were granted, the district court did not abuse its discretion in denying the motion. *Waters*, however, involved "obvious prejudice" to the defendants because plaintiffs sought to litigate an issue that they had previously conceded. *Id.* at 507. It thus is not controlling under these facts.

"The purpose of [Rule 15(d)] is to promote as complete an adjudication of the dispute between the parties as is possible." C.A. Wright & A.R. Miller, *Federal Practice and Procedure* § 1504, at 536 (1971). Because UDA would not be unduly prejudiced by the minimal further discovery that may be required, the district court on remand should allow the motion.

REVERSED and REMANDED.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-245 PHX CAM
No. CIV 80-252 PHX CAM

STATE OF ARIZONA,

Plaintiff,

vs.

UNITED DAIRYMEN OF ARIZONA, et al.,

Defendants.

and

JEROME LaSALVIA and PEGGY LaSALVIA,
husband and wife,

Plaintiffs,

vs.

UNITED DAIRYMEN OF ARIZONA, et al.,

Defendants.

ORDER

The main parties in this antitrust action are Plaintiff, who owns and operates a dairy farm in Arizona and Defendant,

which is a non-profit Arizona organization operating as an agricultural marketing cooperative of dairy farmers. Plaintiff has alleged that Defendant restrained and monopolized the marketing of raw milk in the "Central Arizona Marketing Area" in violation of federal and state antitrust laws. Plaintiff has further claimed that he has been damaged to the extent of the difference between the Federal Milk Order minimum "blend price" he would have received by delivering excess milk production to Arizona handlers regulated by the Central Arizona Milk Order, and the price they actually received by selling excess milk out of state.

Defendant has now filed a Motion for Summary Judgment, alleging that Plaintiff's claims are barred by the applicable four-year statute of limitations, (15 U.S.C. § 15(b)) since the alleged injury and cause of action accrued, if at all, in the period from April 1974 to May 1975—more than four years prior to the commencement of this action in March 1980.

Plaintiff, in response, has argued that there are disputed fact issues concerning the irrevocability of Defendant's refusal to deal with Plaintiff, that the cause of action herein is not based upon a single refusal to deal, but upon an ongoing conspiracy, that the statute of limitations should be tolled by Defendant's alleged fraudulent concealment of certain facts, and that in any event, there is no statute of limitations bar to the injunctive relief which Plaintiff seeks.

The parties argued this motion before the Court on October 31, 1983.

Defendant has noted that in spite of the holding in *Poller v. Columbia Broadcasting System, Inc.*, 82 S.Ct. 486, 491, 368 U.S. 464, 473 (1962), which warned that summary procedures should be used sparingly in complex antitrust litigation, courts have not hesitated to grant summary judgment to defendants in appropriate circumstances—even where a conspiracy is alleged to have occurred. *Zenith Radio Corp. v.*

Hazeltine Research, Inc., 91 S.Ct. 795, 806, 401 U.S. 321, 338 (1971). Defendant further notes that since it refused to buy milk from Plaintiff in 1974 and 1975, Plaintiff's cause of action should be barred, since he brought suit in 1980, over four years later.

The applicable statute, 15 U.S.C. § 15(b), states in pertinent part: "Any action to enforce any cause of action under Section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section . . . shall be revived by said sections."

Nevertheless, Plaintiff has maintained that even one of Defendant's employees has been equivocal as regards whether he absolutely refused to deal with Plaintiff, since his deposition testimony indicated that the situation would be checked out, and that Defendant would let Plaintiff know whether it could take his milk.

In a similar action, but one brought by cattlemen, ranchers and feeders against retail food chains, a national trade association, and a beef industry price reporting publication, involving alleged violations of Chapter 15 of the United States Code, it was found that a genuine issue of fact existed as to when plaintiffs had actual or constructive knowledge of their cause of action, precluding summary judgment on their claim that fraudulent concealment by the defendants of an alleged conspiracy would toll the four-year statute of limitations. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *reh. den.*, 616 F.2d 569, *cert. den.*, 101 S.Ct. 280, 281, 449 U.S. 905, 66 L.Ed.2d 137 (1980).

Regarding the claim of fraudulent concealment, it was held, in *In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552 (D.C. Md. 1978), that to establish a claim of fraudulent concealment in order to avoid the defense of limitations in a

private antitrust action, the plaintiff must prove fraudulent concealment by the defendant raising the statute, together with the plaintiff's failure to discover facts which are the basis of his cause of action, despite the exercise of due diligence on his part.

Plaintiff herein has claimed that the refusal to deal was not conveyed to him as an absolute, and that the statute should therefore be tolled. Because of the issue of fact regarding the refusal to deal, this Court is in agreement with Plaintiff.

In *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir. 1981), *cert. den.*, 454 U.S. 816 (1981), a defendant's initial refusal to sell its line of china and dinnerware to a plaintiff retailer was held to trigger the four-year limitations period, and subsequent refusals to sell were not found by the court to be separate violations, but rather mere reaffirmations of the original decision not to deal with plaintiff. *Orgell, supra*, was again cited in *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir. 1979), *cert. den.*, 444 U.S. 900 (1980), where the court mentioned that the subsequent requests to deal in *Orgell* were "forlorn inquiries by one, all of whose reasonable hopes had previously been dashed." However, *Multidistrict Vehicle Air Pollution* also found that nothing in the record of that case indicated that the decisions not to act ". . . were irrevocable, immutable, permanent and final. For this reason, all injury to AMF necessarily resulted from the 1964 rejection of the Smog Burner."

In the case at bar, as has already been noted, there is a question of fact as to whether the initial refusal to deal was "irrevocable, immutable, permanent and final." Therefore, this Court cannot agree with Defendant that summary judgment should be granted.

Summary judgment should be precluded when there is a fact issue about whether a defendant has refused to deal and

whether or not that refusal was motivated by an anti-competitive intent. *California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001 (9th Cir. 1981); *Tillamook Cheese & Dairy Assn. v. Tillamook County Creamery Assn.*, 358 F.2d 115 (9th Cir. 1966).

Another fact at issue is whether damages in this case are subject to an accurate estimate, or are merely speculative. Defendant claims that Plaintiffs could easily resort to a formula for figuring damages, which Plaintiffs have denied on the basis of climate and selling factors.

An additional point brought out by Plaintiff is that the four-year statute of limitations is not applicable to an equitable proceeding for injunction relief from violations of the antitrust laws, citing *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 296 F.Supp. 920 (D. Haw. 1969). However, Defendant also notes that the above case involved a request for only injunctive relief, and that in *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 197 F.Supp. 613, 626 *affd.*, 307 F.2d 207, *cert. den.*, 83 S.Ct. 872, 372 U.S. 929, 9 L.Ed.2d 733 (1961), the court held that where there is both a legal and an equitable remedy for the same wrong, if the legal remedy is barred by the lapse of time, the equitable remedy is also barred, and this rule is applicable to actions in equity to enforce an implied or constructive trust.

In any event, the existence of an issue of fact as to whether the refusal by Defendant to deal with Plaintiff was absolute and irrevocable should preclude the granting of summary judgment in Defendant's favor.

Therefore,

IT IS ORDERED that Defendant's Motion for Summary Judgment, filed August 22, 1983, is denied.

Dated this 8th day of November, 1983.

C. A. MUECKE, Chief Judge

APPENDIX C
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-245 PHX CAM
No. CIV 80-252 PHX CAM

STATE OF ARIZONA,

Plaintiff,

vs.

UNITED DAIRYMEN OF ARIZONA, et al.,

Defendants.

and

JEROME LaSALVIA and PEGGY LaSALVIA,
husband and wife,

Plaintiffs,

vs.

UNITED DAIRYMEN OF ARIZONA, et al.,

Defendants.

ORDER

Having received and considered Defendants' Renewed Motion for Summary Judgment, memorandum with appendix, and statement of facts in support thereof, filed June 25, 1984; Plaintiffs' Response, memorandum, exhibits and statement of facts in support thereof, filed July 25, 1984; Defendants' Reply, filed October 16, 1984; Plaintiffs' Motion for Leave to File Supplemental Complaint, filed September 6, 1984; Defendants' Response, filed October 19, 1984; Plaintiffs' Reply, filed October 29, 1984; and Plaintiffs' Motion for Reconsideration, filed December 4, 1984; and having heard oral argument on Defendants' Renewed Motion for Summary Judgment and

Plaintiffs' Motion for Leave to File Supplemental Complaint on Tuesday, October 18, 1984, this Court finds as follows:

Defendants' Renewed Motion for Summary Judgment

Defendants' Renewed Motion for Summary Judgment is based upon the four-year statute of limitations in the Clayton Act, 15 U.S.C. § 15b. Defendants basically argue that Plaintiffs' own conduct and statements prove that Plaintiffs were aware of their antitrust claims in 1974 or 1975; but this action was not filed until March 31, 1980 and is thus barred by the applicable statute of limitations.

With respect to the statute of limitations argument, this Court finds that there is no material issue of fact. The parties' statements of fact submitted pursuant to Local Rule 11(i) indicate that following Shamrock Foods' refusal to continue to purchase Plaintiffs' raw milk in excess of the amount specified in their contract, Plaintiffs sought to sell their excess milk to Defendant United Dairymen of Arizona (UDA) in April 1974; UDA refused. In both June and August of 1974, Plaintiffs filed briefs with the U.S. Department of Agriculture alleging that UDA was attempting to monopolize the raw milk market in the Central Arizona Marketing Area and complaining about the fact that UDA refused to buy Plaintiffs' milk.

In February 1975, Plaintiffs' attorney telephoned UDA's attorney and inquired whether UDA would buy Plaintiffs' milk; the request was refused. Also in February 1975, Plaintiff Jerome LaSalvia dumped milk on the ground and issued a press release in which he complained about the fact that neither UDA nor any other milk handler would purchase his milk. Plaintiff himself called UDA Executive Director Robert Girard in February 1975 and requested that UDA purchase his milk. Plaintiff later testified in deposition that on that occasion Mr. Girard told Plaintiff never to call again, i.e.,

that if UDA wanted to buy Plaintiff's milk then UDA would call Plaintiff, but that Plaintiff should not call again. Plaintiff Peggy LaSalvia overheard this conversation, and testified in deposition that Mr. Girard was "very emphatic."

In March 1975, Mr. LaSalvia provided information to Mr. Currin Shields, President of the Arizona Consumers Council, so that Mr. Shields could write a letter to the Antitrust Division of the U.S. Department of Justice complaining about UDA's monopoly over the milk market in Arizona. In April 1975, Plaintiffs' attorney again contacted Defendants' attorney to discuss whether UDA would purchase Plaintiffs' milk; the notes of Plaintiffs' attorney reflect that UDA's attorney said UDA would not purchase milk from non-members of UDA. In fact, the notes themselves state: "bottom line—won't take milk from non-member producer." Also in April 1975, Plaintiff asked a dairy in El Paso if it would buy Plaintiffs' milk; that request was refused.

On May 23, 1975, Plaintiff Jerome LaSalvia again called Mr. Girard, and against Plaintiff's request to sell milk to UDA was refused. Plaintiff entered a note in his diary: "9:30—Girard—no-no-no." After this conversation, Plaintiff never again directly contacted UDA about purchasing his milk until after this action was filed in 1980.

In June 1975, Plaintiff asked handlers Safeway, Carnation and Foremost to purchase his milk, but all requests were refused.

The parameters of this case have been severely narrowed by this Court's Orders filed September 14, 1984 (denying Plaintiffs' Motion for Partial Summary Judgment) and September 18, 1984 (granting Defendants' Motion to Limit Issues To Be Tried). Those orders were carefully considered, and based upon a complete review of the facts and case law pertaining to Plaintiffs' standing to challenge many of UDA's

alleged practices. In those Orders, this Court specifically held that Plaintiffs lack standing to challenge UDA's base plan and several other practices allegedly engaged in by UDA, and found that the damages sought by Plaintiffs arise from their conspiratorial and unilateral refusal-to-deal claims. Those allegations are all that properly remain in the case, and based upon the undisputed facts recited above, it is clear that Plaintiffs and their counsel had notice of both the conspiratorial and unilateral refusals to deal during 1975.

Defendants rely heavily on *Orgell v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 92 (1981). *Orgell*, like the case at bar, involved only conspiratorial and unilateral refusals to deal. The Ninth Circuit affirmed the district court's finding that all refusals to deal subsequent to the initial refusal were mere reaffirmations of the original decision not to deal. While there were refusals made during the four-year period prior to the filing of the action, the initial refusal had been made over twelve years prior to the filing, and the Ninth Circuit agreed that the claims were time-barred.

Here, there were no unilateral refusals to deal by UDA during the limitations period, because Plaintiff never contacted UDA between 1975 and the time the action was filed.[1] As for conspiratorial refusals to deal, these claims stem from full-supply contracts entered into between UDA and other Arizona processors as early as 1960, and from UDA's alleged attempts

[1] Even if this Court were to consider informal discussions between counsel for the parties at an unrelated legal meeting during 1977-78 as a contact between Plaintiffs and Defendants, UDA repeatedly refused to accept Plaintiffs' milk, and these refusals are reaffirmations of the initial refusal(s). In *Orgell*, there were refusals during the limitations period, but this did not preclude a finding that the initial refusal was final, the subsequent refusals were reaffirmations of the initial refusal, and a holding that the statute of limitations had run.

to enforce those contracts by pressuring other processors not to purchase Plaintiffs' milk. Again, Plaintiffs were made well aware of the contracts and of the other processors' refusals to purchase Plaintiffs' milk in or before 1975; and the continuation of the contracts and of the refusals by other processors were reaffirmations of the original refusal(s) to deal.

Plaintiffs argue that in a civil conspiracy case the statute of limitations does not run from the first overt act in furtherance of the conspiracy, but "from the commission of the last overt act alleged to have caused damage." *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 194 (9th Cir. 1956). However, that same case also states:

> . . . in order to start the running of the statute of limitations there must be damage occasioned by an overt act. *In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck.* Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run. Otherwise, in a continuing conspiracy, the cause of action would never fully develop, nor would there be any limitation upon the right of action, and the beneficent purpose of the statute to delimit the right to sue would be defeated.

Steiner, supra, 232 F.2d at 195 (emphasis added).

Here, as was pointed out above, there was no overt refusal to purchase Plaintiffs' milk by UDA after 1975, because Plaintiffs never again directly approached UDA until after this action had been filed in 1980. There were refusals by other processors to purchase Plaintiffs' milk during the limitations period, but these refusals were made because of full-supply contracts in existence since about 1960. Plaintiffs have

not alleged that they did not know about the contracts or that the contracts were not enforced until the limitations period.

Western Shoe Gallery v. Duty Free Shoppers, No. C-82-0625 EFL (N.D. Cal., Sept. 7, 1984), brought to this Court's attention in a Supplemental Response filed by Plaintiffs, is not especially helpful because there, the trial court found evidence of many recent overt acts in furtherance of the conspiracy, including continued rebate payments, physical steering of tourists away from plaintiff's shop, and enforcement of the boycott by a trade association. The court barred plaintiff from suing for acts prior to the four-year limitations period, but allowed plaintiff to sue for acts occurring within the limitations period which caused injury.

Here, there are no clearcut allegations or evidence of overt acts by Defendant UDA during the limitations period. While Plaintiffs claim that other processors refused to deal with them because of their contract with UDA, they allege no overt affirmative acts on the part of UDA during the limitations period.

In the case at bar, it is clear to this Court that Plaintiffs' cause of action accrued no later than 1975, and it is also clear that Plaintiffs themselves knew of and believed they had a cause of action in 1975. The evidence shows that Plaintiffs believed that UDA's and the other handlers' refusals to deal with them were final; this finding is supported by Plaintiffs' complaints to both the Justice Department and the Department of Agriculture of UDA's acts during 1975, and Plaintiffs' own descriptions of their contacts with UDA. Plaintiffs' claims are barred by the four-year statute of limitations, *Orgell, supra*; *see also In Re Multidistrict Vehicle Air Pollution,* 591 F.2d 68, 71-72 (9th Cir. 1979).

Plaintiffs' argument that reconsideration of the statute of limitations issue is barred by the doctrine of law of the case

is without merit. "Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 1391 (1983). Rather than deciding a rule of law in denying Defendents' previous motion for summary judgment, this Court found that a material issue of fact precluded summary judgment.

Similarly, Plaintiffs' argument that fraudulent concealment tolled the statute of limitations must be rejected. Plaintiffs have not pled fraudulent concealment in their First Amended Complaint at all, much less with the particularity required by *Rutledge v. Boston Woven Hose & Rubber Co.,* 576 F.2d 248, 250 (9th Cir. 1978). Further, the evidence indicates that Plaintiffs were aware of the refusals to deal by both UDA and other handlers in 1975.

Plaintiffs' last attempt to toll the statute of limitations is the argument that damages occurring as a result of these refusals to deal were speculative or unprovable during the limitations period. Defendants, however, have described how Plaintiffs could have computed both types of damages claimed during the limitations period in the same manner as Plaintiffs' expert has now computed them. Plaintiffs have not clearly responded to this argument, and it does appear that Plaintiffs' damages were ascertainable during the limitations period—certainly at a time just before the four-year limitations period expired and in any event at the time of trial.

Thus, based upon the absence of a material fact issue and of any affirmative overt acts by Defendant UDA during the limitations period other than a continued and reaffirmed refusal to deal with Plaintiffs, which do not constitute overt

acts, and for all the other reasons argued by Defendants in their pleadings, Defendants' Renewed Motion for Summary Judgment should be granted.

Plaintiffs' Motion to File Supplemental Complaint

Because the rest of this action is being dismissed, this motion should be denied as moot. There are, however, other reasons supporting denial of the motion. First, the Supplemental Complaint which Plaintiffs propose to file contains a new claim not included in Plaintiffs' First Amended Complaint, i.e., the allegation that "UDA has made its milk manufacturing facilities available to plaintiffs only at rates that result in payment by UDA of prices less than the Order 131 minimum price." ¶ 24, Plaintiffs' Proposed Supplemental Complaint. In light of the facts that (1) this allegation is one which Plaintiffs have known about since 1981 and could have raised long before now; (2) it appears to be a disguised challenge to UDA's base plan, which was eliminated as a raisable issue in this action in this Court's Orders filed September 14 and 18, 1984; and (3) its addition would require re-opening of discovery, Plaintiffs' Motion should also be denied on its merits.

Plaintiffs' Motion for Reconsideration

Plaintiffs have filed a motion to reconsider this Court's Order of September 18, 1984, granting Defendants' Motion to Limit Issues To Be Tried. The motion is partially based on a recent case, *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), in which the Ninth Circuit discussed and applied the Clayton Act standing factors articulated by the U.S. Supreme Court in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 419, 103 S.Ct. 897 (1983). Neither *Ostrofe* nor Plaintiffs, however, address one of the most critical concerns expressed by this Court in its Order of September 18, 1984: "we deal here with an agricultural cooperative which is permitted to acquire and maintain

a legal monopoly. . . . Plaintiffs have challenged several of UDA's practices as being predatory and in furtherance of a monopolistic scheme. Because it is legal for this Defendant to further its monopoly, it would appear especially critical for Plaintiffs to show an injury caused by such practices." Order, September 18, 1984.

This Court fully considered all the arguments made in Plaintiffs' Motion for Reconsideration when it issued its Order of September 18, 1984, and sees no basis for overturning its prior order.

Based upon the foregoing,

IT IS ORDERED that Defendants' Renewed Motion for Summary Judgment, filed June 25, 1984, is granted in its entirety.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Supplemental Complaint, filed September 6, 1984, is denied.

IT IS FINALLY ORDERED that Plaintiffs' Motion for Reconsideration, filed December 4, 1984, is denied.

DATED this 21st day of December, 1984.

C.A. MUECKE

U.S. District Judge

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1592 DC CV 80-0252 CAM

JEROME LaSALVIA and PEGGY LaSALVIA, husband and wife,

Plaintiffs-Appellants,

vs.

UNITED DAIRYMEN OF ARIZONA, an Arizona marketing association; ROBERT M. GIRARD and LEONARD F. CHEATHAM,

Defendants-Appellees.

APPEAL from the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded. Costs taxed. Filed November 21, 1986

APPENDIX E
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-1592
D.C. No. Cv 80-252 PHX CAM

JEROME LaSALVIA and PEGGY LaSALVIA,
husband and wife,
Plaintiffs-Appellants,

v.

UNITED DAIRYMEN OF ARIZONA, an Arizona marketing association; ROBERT M. GIRARD; and LEONARD F. CHEATHAM,
Defendants-Appellees.

ORDER

January 20, 1987

Before: GOODWIN, HUG and REINHARDT, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

Arizona Milk Producers
Federal Milk Marketing Order 1131
Central Arizona Marketing Area
Phoenix, Arizona
c/o Mr. Calvin G. LaSalvia
Rt. 1, Box 954
Laveen, Arizona 85339
June 10, 1974
Hearing Clerk
Room 112-A
Administration Building
United States Department of Agriculture
Washington, D. C. 20250
Re: 7 CFR Part 1131
MILK IN THE CENTRAL ARIZONA MARKETING AREA
RESPONSE TO NOTICE OF PROPOSED SUSPENSION OF CERTAIN PROVISIONS OF THE ORDER

We, the undersigned dairy farmers located in the Central Arizona Marketing Area, 1131, protest the suspension of the provision for June and July 1974, that not more than eight days' production of any producer may be diverted to a non-pool plant from a pool plant during the month, pending a public hearing.

We respectfully oppose this suspension, pending such a public hearing where upon the facts and pertinent information concerning this subject may be fully examined and proper determination rendered. Following is a point rebuttal of the purported basis for such a suspension and attached hereto is relative copies of recent inquiries as to the existing inequitable conditions which may exist within this market. This attached material is used only as a reference and is not intended as

evidence nor is it to be construed as being complete. At such times as may be deemed necessary, other related and relative information would be made available for public hearing.

The purported basis for the suspension are:

1. A temporary increase in production. Temporary means for a short period only, not intended for permanent use or being. During the past eighteen (18) months a deliberate and explicit plan to increase production far above the normal year to year average of approximately seven (7%) per cent has been undertaken by the petitioning party, a cooperative. It has been their intent to willfully saturate the Central Arizona Market far above rational economic judgment. According to the USDA Milk Production Report of February 11, 1974, a full fifteen (15%) per cent increase in milk production was recorded in this market at the end of 1973. The cooperative producers have reached as high as nineteen and one-half (19½%) per cent April 1974 increase over the preceding April. There appears to have been little concern for regulating production within the range of recent market expectations. It is provided within the framework of said cooperative to issue base permits to increase production at will and it is also fully within the power of said cooperative to rescind said excess production. The cooperative does not have the inherent right to arbitrarily force surplus milk products into the pool when in essence all producers would subsidize the pool blend price and be paid in accordance with the Class utilization.

2. The purported decline in Class I sales is not factual nor does it represent a clear accounting as prepared by the Federal Market Administrator during the past twelve months. Total Class I sales for the past twelve months of record, May 1, 1973 through April 30, 1974

inclusive, were 505.6 million pounds for an average monthly figure of 42.135 million pounds milk. Total Class I sales for the twelve month period of May 1, 1972 through April 30, 1973 inclusive, was 499.5 million pounds, for an monthly average of 41.625 million pounds milk. An actual increase of one-half (½) million pounds of Class I sales per monthly average was recorded during the last twelve months of record over the preceding twelve months. As of the latest Market Information Bulletin, May 1974, for the Central Arizona Milk Area an increase in Class I sales of 1.3% daily was recorded. Quoting from the Bulletin: "DAILY CLASS I SALES INCREASE: Sales of Class I milk within the marketing area equaled 41,531,757 pounds during April 1974. Daily sales averaged 1,384,392 pounds, 1.8% above those recorded in March 1974, and 1.3% above last April's average of 1,367,138."

3. It is highly speculative for the cooperative to assume that their plant will have to receive and manufacture more milk in June & July of this year than had reasonably been anticipated. Historically, the production in Arizona during the summer months has dropped 10 to 15% due to severe heat stress associated with 100° plus temperatures. And currently feed prices of grain and hay are not conducive to excessive feeding associated with high production. It can be pointed out that the cooperative has at its sole disposal a new cheese manufacturing plant newly built and operating sufficient to take care of any and all surplus milk which may be associated with this market. Furthermore, it is not compatible to argue for a suspension of a provision to export milk of its producers, when it is on record that as late as May 25, 1974,

milk was imported into this market by said cooperative from a large Texas based cooperative.

4. It is not correct to argue that substantial quantities of milk regularly associated with the pool during the past fall and winter would necessarily be excluded from the pool. First, the substantial quantities of last fall and winter were premediated increases based on decisions initiated by said cooperative. This milk, although included in the pool, is not anywhere near a normal or responsible increase as associated with the market for the past ten years. And furthermore, the milk in question only tended to decrease the blend price by depressing Class I percentage of utilization. Henceforth, putting an undue burden upon all dairymen in respect to the amount of money received. Class I utilization fell to less than 62% in 1974 compared to 77% for 1973. Continued diversion of such amounts of milk will not be inducive to a higher utilization in this market. And such diversion would not be helpful in eliminating over quota production of 5,703,065 pounds for the month of April 1974 by cooperative members. The official cooperative Market Report for April 1974, projects market needs June through December 1974 as 97% of quota. This is completely inconsistent with their request to suspend the provisions in question. Why does producer milk need to be diverted more than eight days as established in the order if this projection is valid?

In Summation: We request that the suspension of the provisions in question be denied pending a full hearing of all producers in the Central Arizona Market Area. It would not seem proper to grant said suspension based upon the contention of the cooperative without a public hearing to that effect. Each contention as discussed lacks real merit in light of USDA facts as well as the market information of the cooperative

itself. First; the increase in production was not intended as temporary, but rather an effort to monopolize the production in the market and further aggravate the problem by allowing imports of raw milk from a large Texas based cooperative. Second; over a yearly period as of April 30, 1974, Class I sales have increased an average of ½ million pounds a month. It has been uncontrolled surplus production which has caused a depression in the blend price. Third; it is not reasonable to import milk and ask to send out milk because of a surplus. Nor is it equitable for the dairyman to suffer depressed prices as a result of this type of mismanagement. Fourth; the nearly 20% increased production as of April 1974 is not a regular increase nor a regular amount associated with the Central Arizona Milk Area pool. Such vast increases only tend to work an unfair disadvantage to the smaller dairyman, dependent upon high Class I usage. It is of the utmost importance to all Arizona dairymen to resolve the cause of the problem through a public hearing rather than trying to alleviate the problem through hasty, temporary suspensatory measures. This proposed suspension of certain provisions of the Order 131 underlies a much deeper marketing problem.

A full and detailed report concerning market problems in the Central Arizona Milk Area is being prepared. It would be most helpful to relay such information as may be contained therein at a formal public hearing. Since the Market Administrator of Order 131 has recently determined that said cooperative has received milk directly from independent dairy farmers without proper authorizations for the handling of such milk. It is not judicious to suspend the said provisions should it tend to provide relief to the parties who have improperly handled milk in this market. Until such time as a public hearing can determine the facts concerning the proper

administration and use of the order, it is respectively asked that request for suspension of certain provisions be denied.

Exhibit A: UDA (United Dairymen of Arizona, a cooperative) Market Report, April 1974

Exhibit B: Market Information Bulletin, May 1974

Exhibit C: Milk Production Report—USDA

Exhibit D: Letter dated January 25, 1974, directed to Sun Valley Dairy, producer, from Market Administrator

Exhibit E: Letter dated February 23, 1974, directed to Market Administrator from Sun Valley Dairy, producer

Exhibit F: Letter dated April 25, 1974, directed to Sun Valley Dairy, producer, from Office of Minority Leader, United States House of Representatives

Exhibit F. 1.: Letter dated April 8, 1974, directed to Honorable John J. Rhodes, Congressman from John C. Blum, Associate Administrator, USDA-AMS; attachment to Exhibit F.

Exhibit G: Authorization to Compensate Handler directed to independent milk producers from United Dairymen of Arizona, a cooperative; authorization was requested after the fact.

cc: Herbert L. Forest
Director of the Dairy Division, AMS
Wilson M. Haverfield
Market Administrator, Order 1131
Honorable John J. Rhodes
Minority Leader, United States House of Representatives
Honorable Sam Steiger
United States House of Representatives

Re: 7 CFR Part 1131
MILK IN THE CENTRAL ARIZONA MARKETING AREA
RESPONSE TO NOTICE OF PROPOSED SUSPENSION OF CERTAIN PROVISIONS OF THE ORDER

We, the undersigned dairy farmers located in the Central Arizona Marketing Area, 1131, protest the suspension of the provision for June and July 1974, that not more than eight days' production of any producer may be diverted to a nonpool plant from a pool plant during the month, pending a public hearing.

JEROME LaSALVIA
KENNETH H. CROW
MANUEL J. SILVA (Glenview Dairy)
GEORGE M. DODDS
DON RAWLINGS (Alpine Dairy)
CALVIN LaSALVIA

Arizona Milk Producers
Federal Milk Marketing Order 1131
Central Arizona Marketing Area
Phoenix, Arizona
c/o Mr. Calvin G. La Salvia
Rt. 1, Box 954
Laveen, Arizona 85339
August 10, 1974
Mr. Richard L. Feltner
Assistant Secretary for Marketing & Consumer Services
Administration Building
United States Department of Agriculture
Washington, D.C. 20250
Re: 7 CFR Part 1131

MILK IN THE CENTRAL ARIZONA MARKETING AREA

RESPONSE TO NOTICE OF PROPOSED CONTINUATION CONCERNING SUSPENSION OF CERTAIN PROVISIONS OF THE ORDER

We, the undersigned dairy farmers located in the Central Arizona Marketing Area, 1131, do hereby protest and object to the continuation of the suspension of certain provisions that provide that not more than eight days' production of any producer may be diverted to a nonpool plant from a pool plant during the month. The suspension expired July 31, 1974. We object further the current marketing policies of the petitioning party through the use of this suspension and the continued condescending attitude of the Agricultural Marketing Service for granting further a continuing suspension of provisions of the Order without due process and proper notice of intent.

In the original request of the petitioning party, a cooperative, a number of pertinent yet questionable problems were deemed as sufficient for asking the Agricultural Marketing Service, hereinafter AMS, to suspend certain provisions of the order.[1] Accordingly, AMS notified all concerned parties as to the "statement of consideration" and allowed sufficient time for interested parties to respond. At that time a group of producers regularly associated with this market protested the proposed suspension.[2]

It is to be noted that AMS duly recognized the arguments, views, and data of the producers in the following decision as "cogent" and as having "received very serious consideration." The decision went on further to say, "A hearing to consider

[1] Notice of Proposed Suspension of Certain Provisions of the Order.
[2] Response to Notice of Proposed Suspension of Certain Provisions of the Order.

all aspects of current and emerging marketing conditions may very well be appropriate".[3]

We, the undersigned producers, continue to protest the continued suspension as granted because of the four initial objections as stated previously, pending such a public hearing. Furthermore, we do hereby protest the continuation of the suspension of the following points.[4]

1. The original suspension as granted by AMS was based on a specific period of time, June and July, 1974, and classified as temporary.

2. At the time of the suspension it was noted that Class I sales had not declined in the previous twelve months of record, but had actually increased ½ million pounds per month on an average basis.

3. The amount of milk could have been reasonably anticipated by the petitioning party as they have complete control of their production and the basis upon which they allow it to fluctuate.

4. The excessive amounts of milk being produced currently and in the immediate past can by no means be considered as a regular or usual amount already associated in the market.[5]

5. It is a gross error to assume that this market is now or shall continue to orderly dispose of milk.[6]

6. It is not in the public interest to continue and abet the current policies as are developing in this market under the auspices of AMS.

7. The continuation of this suspension will continue to work undue hardship on a number of producers in that

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[3] Order Suspending Certain Provisions.
[4] Milk in the Central Arizona Marketing Area Order Suspending Certain Provisions.
[5] Current Milk Market Report.
[6] Letter to Producers by Shamrock Foods; dated April 4, 1974.

it will tend to depress the blend price of milk and further aggravate the normal production of this market.[7]

8. It is not necessary to assure "relatively heavy supplies of reserve milk" being marketed in this area as it only will tend to serve as an undue hardship on producers and ultimately the consumer.

9. Since the suspension was originally approved for the months of June and July yet continuation sought in August (which historically is a low month in this market) are we to assume a further continuation is to be given through November, 1974, as paragraph 1131.13 would indicate?[8] And if so does this not effectively delete the paragraph's intended usage on a yearly basis without the petitioning party having given evidence through public hearing?

10. Further, a continuing investigation by the Market Administrator, Order 1131 concerning possible improper handling and/or classification of milk in this market by the original petitioning party as well as others, may bear heavily on the continued order in this market.

Should it be the intent of AMS to provide relief to the petitioning party by allowing all milk produced in this market to become pooled irregardless of real need or apparent detriment to blend pricing, then it is only just and in the public interest to allow all milk produced in this market to be pooled whether or not it is received at a pool plant. Furthermore, it would appear completely and unequivocally discriminatory to allow only certain producers in this market to pool all milk produced despite need or utilization. If the member of a cooperative has the inherent right to have all his milk pooled whether or not essential need is established then the Order must afford the

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[7] Market Production and Comparison Last Twelve Months.
[8] Paragraph 1131.13 of the Order.

same rights to all producers. It has never been the intent of the Agricultural Marketing Agreement Act of 1937 to discriminate against certain producers and any such interpretation either by intent or prejudice is in violation of that said Act. Although the Capper-Volsted Act of 1922 grants Agricultural Marketing Cooperatives immunity from monopoly, it appears that gross misuse of these immunities may exist. It is a fact that the petitioning party, a cooperative, maintains the only surplus plant within the order for pool classification. It is a recorded fact that said cooperative refused to receive milk at their plant from individual independent producers during periods of surplus production. It is a fact that said cooperative received directly unspecified quantities of milk directly from these same independent producers previously and allowed it to enter the pool.[9] It is a fact that these independent producers sought relief from: (a) the handler/s, (b) the cooperative, (c) the Department of Agriculture, and (d) various other interested parties.[10] And it is a fact that any and all equitable remedy has been denied to the independent producer by the above parties in an effort to pool their so-called excess contract milk.[11]

We therefore resubmit for consideration not only the arbitrary administration of the Order by AMS as being discriminatory and not in accordance with the Act, but vehemently protest the continued abuse of certain producers within this market which tends to accentuate market problems rather than resolve them. And finally, it is hereby requested that if

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[9] (Two) Authorization to Compensate Handler; dated May 6, 1974, to Independent Producers from United Dairymen and Shamrock Foods.

[10] Letters: to Arizona Milk Inc.; United Dairymen of Arizona. Editorial: By Herbert Saal, Editor American Dairy Review.

[11] Memorandum Dated August 6, 1974, from Mr. Paul P. Dew of Shamrock Foods.

the petitioning party must seek further to suspend provisions of the Order, that they do so only after public hearing to that effect. As has been previously noted both the petitioning party and the AMS recognized the need for such a hearing. We submit that adequate time has elapsed for that procedure to have been initiated by either/or both parties. It would be gross negligence to continue on without the appropriate detail of this issue.

Jerome LaSalvia
268-0140

Jerome LaSalvia, probably the last independent dairy farmer in Arizona will be forced to dump about 100,000 lbs. of milk Thursday night. Shamrock the creamery processor he has shipped to for over ten years, has informed him it will not continue taking milk over their stated contract as they have done in the past. (Cows fluctuate their milk production with the season, producing much more in the spring with green hay and nice weather, and drop drastically in the heat of Phoenix summers.)

The principle surplus milk plant in Phoenix is owned by UDA, a cooperative; because Mr. LaSalvia is not a member of their cooperative they will not purchase his milk.

Phoenix and most of central Arizona is under a Federal Milk Marketing order; the government figures out the floor of the prices of milk in a complicated computation based on Minnesota-Wisconsin prices; they then audit the amount of milk produced in the Arizona market and audit its usage—fluid milk, butter, or cheese, etc.—puts it into what it defines as a "pool" and instructs the processors to pay the independent dairy farmer or the cooperative a "blend" price. Therefore, the processors pay the same price per hwt. to either the independent or cooperative dairy farmer UNLESS the coopera-

tive gets a premium above this floor set by the Federal government as they did in August and September 1974.

Local producer-distributors (processors that have their own dairy farms and traditionally process only their own milk) cannot purchase LaSalvia's milk; in order to do so they would have to submit to the Federal Milk Marketing Order and pay a considerable sum to the pool on all the milk *their own* cows produce.

The other processors in Phoenix, Safeway, Carnation, Bordens, and Foremost have also refused to purchase the Grade A milk. (These same processors also refused to purchase Grade A milk in August and September 1974 when 6 independent dairy farmers offered it to them in full-truck loads at 62 cents hwt. less than the cooperative demanded and received at that time.)

Peggy LaSalvia—Dep. Exh. No. 15—10/1/82.

Files
CU 7254
CU 7255
Cornell—8313
Cohen—8417

February 27, 1975

L.A. Field
Office: Gary M. Cohen

File: 60-139-0

Chrono
Bold
Milk: Telephone Conversation with Jerome LaSalvia,
Phoenix, Arizona (602) 268-0140 or

LaSalvia called to complain about the activities of the 4 major milk processors in the Phoenix area—Carnation, Borden, Shamrock, and Foremost—and the dominant cooperative—

United Dairymen of Arizona. He accused them of a variety of things including price fixing and excluding the milk of independent farmers.

LaSalvia said he had complained to our Los Angeles Field Office on a number of occasions and that one of our L.A. lawyers had interviewed him. Yet, no action was taken. He continued to complain to that Office but it continued to ignore him. LaSalvia also had some contact with the San Francisco Field Office. He said that he called Washington, not expecting any action, but merely to "build a record."

IN THE UNITED STATES DISTRICT COURT
IN THE DISTRICT OF ARIZONA

No. CIV 80-245-PHX-CAM
No. CIV 80-252-PHX-CAM

STATE OF ARIZONA,

Plaintiff,

vs.

UNITED DAIRYMEN OF ARIZONA, an Arizona Cooperative Marketing Association,
ROBERT M. GIRARD and LEONARD F. CHEATHAM,

Defendants.

JEROME LaSALVIA, et ux.,

Plaintiffs,

vs.

UNITED DAIRYMEN OF ARIZONA, an Arizona Cooperative Marketing Association,
ROBERT M. GIRARD and LEONARD F. CHEATHAM,

Defendants.

Phoenix, Arizona
July 6, 1982
9:30 o'clock a.m.
DEPOSITION OF JEROME LaSALVIA
VOLUME I
(Pages 1 through 223)

* * * were.

Q. You don't believe there were what?

A. Any notes regarding him, that I had talked to—

Q. And why is that?

A. Well, somewhere we had a conversation, and he made it quite clear to me—

Q. About what?

A. About the fact that I should never call him again.

Q. When was that?

A. Way back when I was having problems with my milk.

Q. What do you mean by way back when you were having problems with your milk?

A. I was calling everybody, including United Dairymen.

Q. Is that the year that you dumped the milk, you mean?

A. That's the year that I had the milk running over the top of the tanks and we dumped it.

Q. Yes. And he told you don't call him again?

A. He said if he wanted to talk to me, he'd call me.

Q. And so you never called him again?

A. I—I think Mr. West made it clear to the lawyer also, so I did not—I did as they asked.

* * *

Q. And can you read the first line?

A. "UDA 5-27-75."

Q. And then what does it say?

A. You have a little more legible copy.

Q. Does it say "Asked Girard to take 4 loads of milk"?

A. Yes.

Q. "Offered to buy back powder"?

A. Yes.

Q. Then what?

A. "He refused." I can't make out the next one. Looks like "Refused to handle milk."

Q. Is that the time when he told you not to call him again?

A. Not positive. It doesn't make that note here anywhere.

Q. Do you have the original of this document?

A. Yes.

Q. I wonder if you'd bring it with you tomorrow so that we could get a more legible copy.

Do you have a specific recollection of this conversation that's referred to, on what appears to be May 27, '75?

A. Based on what it says there, I tried to at least put it in powder, I could have fed the calves.

* * *

(Caption)

Phoenix, Arizona
July 9, 1982
9:30 o'clock a.m.

CONTINUED DEPOSITION OF JEROME LaSALVIA
VOLUME IV
(Pages 529 through 668)

* * * which says, only, "Claude P. Cobb—John S. Pierce—Attorney General—Special Agent—Processed—Milk Monopoly," and ask you if you can recall that conversation?

A. No.

Q. Do you recall what the conversation related to with a special agent or Attorney General?

A. I cannot recall the conversation.

MR. BERDE: Let's take about two minutes, there's something I've got to find that I overlooked.

(Whereupon a recess was taken.)

MR. BERDE: I found it.

Q. BY MR. BERDE: Turning back to May 23, 1975, and directing your attention to the transcript portion where there's first an entry in handwriting up above, "9:30—Girard—No-No-No."

Do you see that?

A. Yes.

Q. Was that your telephone call to Mr. Girard?

A. I believe so.

Q. That was the occasion where he said, "I'll call you if we've got room," or what you referred to earlier?

A. I'm not sure if this is the specific conversation, it is possible.

Q. Is that all you remember Mr. Girard saying?

MR. GIBSON: Is what all you remember Mr. Girard * * *

(Caption)

DEPOSITION OF ROBERT GIRARD

VOLUME I

Phoenix, Arizona

July 29, 1982

10:15 o'clock a.m.

* * * knowledge even though it may be reflected elsewhere in the records. You know that quite well.

Q. So, your best estimate is that it would cost millions of dollars for the entire manufacturing plant?

A. Oh, I think it's probably 8 to 10 million dollars.

Q. You were here during parts of Mr. LaSalvia's deposition. Do you recall him talking about a telephone conversation that he had with you in May of 1975?

A. Yes.

Q. Do you have any independent recollection of that telephone conversation?

A. Well, I had several conversations with—with Mr. LaSalvia, and I don't recall that one—

Q. When you say you had several conversations—

A. —separately.

Q. I'm sorry.

When you say you had several conversations with Mr. LaSalvia, over what period of time do these conversations span?

A. '74 and '75. I think—I think that May, '75, may have been the last time. It was—in the middle of '75 was the last time I have talked to him.

Q. Do you have any approximation as to how many times you talked to Mr. LaSalvia during that period?

A. Four or five times.

Q. Were these conversations about various matters or always about his trying to find a place for—to get rid of his milk?

A. Various matters.

Q. What matters do you recall being discussed during those four or five conversations?

A. Well, he came in originally in January of '74 wanting some information regarding joining our organization. I believe in '74 he called one time and said he had a load or two of milk. And in '75 once or twice he called and said he had a load, or, I think, in May there he had four loads of milk.

Q. In January of '74 when he came in and inquired about joining UDA, would you tell me what you recall about that conversation.

A. Well, that's the conversation that was taped, so I—generally, they just wanted some information. They wanted to know if we would be willing—there were three of them,

independent producers. They wanted to know if we would discuss the possibility of them joining our organization.

Q. That was the tape we listened to during the last deposition?

A. Right.

Q. Except for what we've already gone over for quite * * *

(Caption)

DEPOSITION OF PEGGY LaSALVIA

(VOLUME I)

(Pages 1 through 159)

Pursuant to the annexed stipulation and notice of taking deposition duly filed in the above cause, the deposition of Peggy LaSalvia was taken by the Defendants as upon cross-examination under the statute, before * * *

* * *

Q. What was the reason that you decided not to join UDA?

A. I didn't think they were operating in good faith. I, in fact, felt like they had forced what had happened in the market.

Q. Forced it how?

A. I felt like that they had actually backed up the milk into their plant on purpose.

Q. When did that occur?

A. When the independents were called in and asked to cut back, when I dumped milk, et cetera, '73, '74.

Q. And your belief is that UDA purposely told Shamrock they didn't have any more room, but it was false?

A. No, I didn't say that.

Q. What then?

A. I think they physically filled it up.

Q. Filled it up how?

A. I think they put milk in the tanks so the tank was full, filled up.

Q. Where did it get the milk?

A. From their own producers, from Shamrock probably, from AMPI.

Q. If they got it from Shamrock, it was your * * *

(Caption)

Phoenix, Arizona
October 1, 1982
9:45 o'clock a.m.

CONTINUED DEPOSITION OF PEGGY LaSALVIA
(VOLUME II)
(Pages 160 through 378)

* * *

Q. Do you recall receiving a letter?

A. Yes, sir.

Q. Now, on April 16, 1975, do I understand you to say that you already had milk sold to California that you anticipated you would not be able to deliver to Shamrock?

A. The date on this letter is April 16th. I do not know when I received the letter. I would assume that it would be after that date in the mail, like the 17th or 18th.

Q. Well, let's assume you received it on the 19th. On April 19, 1975, did you already have milk sold to California that you anticipated you could not deliver to Shamrock?

A. My recollection is that we had already made arrangements with a buyer for the milk in California when we received the letter.

Q. Were those arrangements a better outlet for you than donating your milk to charity?

A. If I was going to receive money for it, it appears it would be better.

Q. Go ahead and clarify anything you want to clarify.

A. At a point in February where it appeared that the creameries that we went to would not take our milk, prior to the dumping of the milk, Jerome did, in fact, call Mr. Girard, and that was the conversation we spoke earlier of that Mr. Girard told him not to call him back. We also got a tanker in from Flagstaff Dairy that day. We fully expected to be able to sell the milk in it, but if we could—or if we could get it to charity, we had a tanker there to transport it.

Q. To where?

A. To wherever and whomever would accept it. The tanker sat at our dairy all day long.

Q. You are saying that—

MR. BOUMA: You want to hear the rest of it?

Q. BY MR. BERDE: You got more?

A. The news media that came did try and get the milk into charity. In fact, they assured us that they thought they could.

MR. BOUMA: You said something with respect to the following month with respect to the letter from Norman. What was that?

THE WITNESS: The following month after Mr. Girard said that he—for us not to call him back and we proceeded to try all the other creameries again, Jerome asked our attorney at that time, Mr. Brophy, to contact UDA because Mr. Girard told us not to talk to him. Mr. Brophy tried to contact UDA to purchase the milk.

Q. BY MR. BERDE: When was that?

A. March, '75.

Q. Um-hmm.

A. Mr. West talked to Mr. Brophy, I believe. I think he—essentially he said that he wished we would stop starting fires that he had to put out and go away and leave him alone.

Q. Who said that?

A. I think he—essentially that's what Mr. West replied to Mr. Brophy.

Q. Is that what Mr. Brophy related to you?

A. Yes.

Q. I see.

A. We proceeded then to arrange with the Health Department to get interstate shipping. We arranged for transportation at Shamrock to transport the milk over to California because their trucks were going there anyway because they were picking up California milk and bringing it back to Phoenix, and after we had made our arrangements, we received a letter from Mr. McClelland, Exhibit 17.

Q. So in February, it's your testimony that Jerome called Bob Girard and it was in February that Bob Girard said, "Don't call me, I'll call you"?

A. Yes, sir.

Q. And so, therefore, you didn't call Bob Girard after that?

MR. BOUMA: For what period of time?

MR. BERDE: I don't know.

MR. BOUMA: Well, that—we know there were communications since then, I guess.

Q. BY MR. BERDE: Well, until recently in 1981?

A. I don't believe—Mr. Girard was very emphatic.

Q. That's not my question.

MR. BOUMA: Peggy, he wants to know whether you had the conversation before or after Mr. Girard made the statement that he'd call you, don't call him, essentially. Did you have any conversation, or Jerome, between you folks and Girard at any time after that conversation in 1981? That was the question.

THE WITNESS: I do not believe that Jerome had any conversations.

MR. BOUMA: Peggy, that's an error. You had the discussion, at least, about the powdered milk.

MR. BERDE: Wait a minute. I don't know if it's an error. Let's see if the witness knows.

MR. BOUMA: That's fine. You can play whatever game you want.

MR. BERDE: It's no game. I want to get her recollection of what the facts are.

MR. BOUMA: That's fine. You haven't asked her about the subject.

THE WITNESS: There was another subject that Jerome had where he tried to sell the milk and buy it back from UDA in powder form.

Q. BY MR. BERDE: When did that occur?

A. I don't know.

Q. Were you in on that discussion?

A. Did I participate in the discussion?

Q. Yes.

A. I don't believe so.

Q. The discussion about what you just related involving an offer to sell milk and take back powder, was that in the time period that we're now discussing, that is February-March, 1975?

A. I think so. I'm not sure.

Q. Okay. Now, while your recollection was being refreshed during the break in your consultation with counsel, were you also refreshed as to Mr. Brophy telling you not to call UDA again?

A. I believe he was relaying Mr. West's request not to call them again.

Q. Did you talk to Mr. Brophy at that time when he relayed what you described as Mr. West's conversation?

A. I may have.

Q. Did you record that conversation in any kind of a memorandum?

A. I've seen it in some notes, but I don't recall.

Q. Have those notes been produced, to your knowledge?

A. I don't recall seeing them.

Q. If such notes exist, would you have produced—have they been produced, to your knowledge?

A. If they were in the form of a memorandum, other than if they were in Jerome's diaries that we don't have.

Q. Did you make a memorandum of that conversation with Mr. Brophy—

A. I don't recall specifically.

Q. —involving his conversation with Mr. West?

A. I don't recall specifically.

* * *

A. Apparently the whole market didn't think so.

Q. Well, at least Shamrock didn't think so because they were bringing the milk in and didn't want to take your milk?

A. Neither did Safeway or UDA or Foremost or—

Q. Well, you don't know about UDA because you didn't call them in March of '75, did you?

MR. BOUMA: That's a little bit argumentative in view of her testimony that they had been told not to call, and secondly that Jerome had—Frank Brophy had called and Dave West told him forget it.

Q. BY MR. BERDE: In any case, my question is that if you had milk that you knew Shamrock wouldn't take and no one else apparently wanted to buy in Phoenix, why didn't you try to get it moved somewhere else?

A. Mr. Berde, I want to sell my milk in Phoenix where it belongs. I was trying to do so. I had, for two months very definitely as this shows, tried to do that.

Q. I understand. You've testified to that.

A. After it became apparent that I would not be allowed in this market with the milk my dairy produced, I eventually went to California with it.

* * *

ARIZONA CONSUMERS COUNCIL
823 W. Adams Street Phoenix, Arizona 85007

March 27, 1975

Thomas E. Kauper, Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20503

Dear Mr. Kauper:

The Arizona Consumers Council respectfully requests that your office immediately investigate monopoly practices in the Arizona milk industry since the August, 1974 federal grand jury indictments of four milk companies, Borden, Carnation, Foremost, and Shamrock, which account for 90% of milk sales in this State, for price-fixing in violation of federal antitrust laws. The companies pleaded no contest to charges.

Jerome LaSalvia, independent dairy farmer of Laveen, is unable to sell milk he produces in this market. Until recently LaSalvia sold milk from his 1000 cow operation to Shamrock Dairy. Shamrock notified him that they would purchase no more milk from him this month. Last month LaSalvia dumped 20,000 pounds of milk because no creamery would buy his milk.

Milk prices in this market were recently increased. United Dairymen of Arizona coop commands premium prices for milk. Milk produced by UDA coop members is sold without difficulty. LaSalvia refuses to join the coop.

LaSalvia now has 100,000 pounds of milk which he has offered to sell to every creamery in this market, including the UDA surplus creamery. No creamery will buy his milk. He has offered to give the milk away to charity rather than dump it. He has been prohibited from doing that.

Jerome LaSalvia is being forced out of the dairy farming business because he refuses to submit to monopoly domination of the milk market in Arizona. This domination is possible because federal antitrust laws are not now being enforced against known violators.

We ask that your office take immediate steps to enforce the antitrust laws against price-fixers in the Arizona milk industry and to protect independent dairy farmers who do not want to be a part of a price-fixing conspiracy.

Sincerely,
CURRIN V. SHIELDS
President

cc: Jerome LaSalvia

John J. Bouma
Kenneth D. Nyman
SNELL & WILMER
3100 Valley Center
Phoenix, Arizona 85073
Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

No. CIV. 80-252 PHX-CLH

JEROME LaSALVIA, et ux.,

Plaintiffs,

vs.

UNITED DAIRYMEN OF ARIZONA, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL PRODUCTION AND REQUEST FOR A PROTECTIVE ORDER

A. RESPONSE TO MOTION TO COMPEL

Until approximately 1974, plaintiffs were able to sell all of their milk in the Arizona market for the so-called "blend" price provided by the Central Arizona Milk Marketing Order. The gravamen of this lawsuit is that defendants, by their monopolistic practices and their concerted activities in restraint of trade, have forced plaintiffs to divert their milk from the Central Arizona Milk Market and to either dump that milk, or sell it in other markets for a price lower than the Central Arizona "blend" price.

Defendants' themselves summarized their First Request for Production of Documents as a request for:

> "all documents which refer or relate to Plaintiffs' business and property. . . ." (Defendants' First Request for Production of Documents, page 3, lines 28-29).

. . . . .

Defendants followed the above quoted language with a litany of every conceivable record which a business could possess.

Plaintiffs' response was to provide defendants with the records of every one of plaintiffs' milk sales during the relevant time period, thereby providing defendants with a clear and concise record of (1) what plaintiffs were able to get for the milk that they were able to sell in the Central Arizona Milk Marketing Order, (2) what they were able to get for their milk when they were forced to sell it elsewhere, and (3) the amounts of milk sold in the Central Arizona Market and elsewhere. In short, plaintiffs gave defendants everything they would need to compute plaintiffs' damages.

Defendants want more.

Defendants want, for the entire "*period of time during which plaintiffs have engaged in the business of the production of milk in Arizona*", (Defendants' First Request for Production of Documents, p.3, l.31, p.4, ll.1-3.) all of plaintiffs' (1) financial accounting documents, (2) documents evidencing income and expenses, (3) banking records, (4) documents evidencing production and disposition of milk (these were provided), (5) tax records, (6) financial statements, (7) documents evidencing ownership of property and indebtedness, and (8) other documents that reflect the type of information contained in the foregoing documents.

1. *Time Period.* Defendants have failed even remotely to suggest why they are entitled to all of plaintiffs' financial records for the entire period that plaintiffs have been in the dairy business. Plaintiffs are only seeking damages for not

being able to sell all of their milk in Arizona from the early 70's on. Plaintiffs do not claim that they were damaged by defendants' activities until the early 70's and plaintiffs have given defendants the records of all of their milk sales from 1968 to 1981.

2. *Financial Accounting Documents, Documents Evidencing Income and Expenses, Banking Records, Tax Records, Financial Statements and Other Records.* Again, plaintiffs are claiming that, because of defendants' actions, instead of receiving the Central Arizona Milk Marketing Order blend price for all of their milk, plaintiffs had to sell their milk elsewhere and therefore receive something less than that blend price. The records produced to defendants reflect the blend price received in Central Arizona, the lower than blend prices received elsewhere, and the quantities of plaintiffs' milk that received each price. Extraneous expenses, banking records and financial statements are totally irrelevant.

Defendants' strategy is, of course, transparent. Plaintiffs own one of the only remaining dairies in the Central Arizona Milk Marketing Order which is not a member of UDA. If the LaSalvias give up these critical financial documents, defendants will quickly ascertain how long the LaSalvias will be able to sustain the financial burden of this lawsuit. Of even greater concern will be defendants' ability to further their monopolistic scheme by applying financial pressure on the LaSalvias' creditors, suppliers and customers. In short, defendants will be in a position to drive the last nail in the coffin of one of the last independent dairymen in Arizona. All of this in spite of the fact that the measure of damages for what really amounts to a theft should be the value of the goods stolen—not the value of the victim.

. . . . .

. . . . .

3. *Documents Evidencing Ownership of Property and Indebtedness.*

This total irrelevancy and immateriality of this request is clear on its face. What possible difference will plaintiffs debt picture have to the issues involved in this lawsuit. When a farmer's cow is stolen from his pasture, is it relevant that the pasture was mortgaged? More to the point, when milk is stolen from the cow, is it relevant that the pasture is mortgaged?

B. REQUEST FOR A PROTECTIVE ORDER

Until defendants restricted their market, plaintiffs had one of the most successful dairies in Arizona. Plaintiffs' ability to survive is a testament to their tenacity and business acumen. Defendants would like nothing more than to have full rein to explore plaintiffs' records and to appropriate plaintiffs' methods of doing business for their own use.

For the foregoing reasons, plaintiffs request that a protective order be entered limiting disclosure of any documents produced to defendants' attorneys and experts retained for this case.

C. CONCLUSION

Defendants' Motion to Compel seems superficially attractive. After all, this is an antitrust case and antitrust cases are supposed to involve lots of documents. Upon closer examination, however, it is apparent this is not a typical antitrust case. Defendants and plaintiffs sell a fungible product at a governmentally controlled price. Defendants, through their anticompetitive activities, have restricted plaintiffs' ability to sell that product for that price. The measure of damages is simply the difference between the market price and the actual price for the amount of plaintiffs' milk that defendants excluded from the market. In view of the number and type of documents requested and their total irrelevance to this case, denial of defendants' Motion is appropriate.

If the Court should decide to order the production of some of the documents, it is imperative that a protective order be entered limiting disclosure of plaintiffs' documents to attorneys and their experts.

RESPECTFULLY SUBMITTED the 17th day of August, 1981.

SNELL & WILMER
By JOHN J. BOUMA
KENNETH D. NYMAN
3100 Valley Center
Phoenix, Arizona 85073
Attorneys for Plaintiffs

COPY of the foregoing mailed this 24th day of August, 1981, to:

David Wm. West
Harold J. Bliss, Jr.
WEST & BLISS, P.A.
4154 North 12th Street
Phoenix, Arizona 85014
Attorneys for Defendants
Jerri P. Forsythe

Law Offices
SNELL & WILMER
3100 Valley Bank Center
Phoenix, Arizona 85073
(602) 257-7211
TELEX 165088

May 8, 1981

BY HAND
Mr. Harold J. Bliss, Jr.
West & Bliss, P.A.
4154 North 12th Street
Phoenix, AZ 85014

Re: Jerome LaSalvia, et ux. v. UDA, et al.

Dear Hal:

At the end of our meeting in your offices on May 5th, I told you that I would get back to you on any additional documents which we would be willing to turn over in further response to your First Request for Production. This letter represents our response.

As you understand by now, the gravamen of our case is that Jerome and Peggy LaSalvia were denied the opportunity to sell all of their milk in this market by certain activities of UDA which we regard as being in violation of the State and Federal antitrust laws. They had to either sell that milk elsewhere—for a lower price—or dump it. In support of that theory, we supplied you with documents evidencing prices and quantities of milk sold elsewhere. You can compute the damages by taking the difference between the Shamrock (blend) price and the non-Shamrock price and multiplying the remainder by the volume of milk either sold outside the market or dumped.

As your April 9, 1981 letter correctly notes, we have also accused UDA of increasing the LaSalvia's costs of doing busi-

ness and increasing capital requirements. Because of the expense involved in conducting a detailed damage study, we are only claiming the cost of the new milk tank which Jerome recently purchased from UDA in order to hold milk for out-of-market or distress sales. And, of course, UDA has its own records on how much Jerome paid it for that tank.

Your Request also asked for quality control test documentation. Although Jerome does keep a few records, they are not well organized, and it would be much easier for you to get those records directly from the State Dairy Commission. Jerome does not believe that he has any health records that are not duplicated in the State Dairy Commission files, and he hereby gives the UDA permission to copy any quality control test results kept by the State Dairy Commission, on the condition that he be allowed to copy the quality control test results for all of the members of UDA.

You have requested documents concerning sales of cattle, on the apparent, and correct, assumption that Jerome has been forced to sell many producing cattle for beef because of the absence of a market for his milk. However, he has elected not to pursue this theory of damages, and will therefore not claim the loss associated with the forced sale of those cattle as beef in lieu of selling their milk.

I trust that the foregoing is satisfactory. If it is not, please give me a call.

Very truly yours,

SNELL & WILMER

KENNETH D. NYMAN

KDN:ljl

LaSALVIA DAIRY
LOST INCOME ANALYSIS

Prepared by:
Frank K. Stuart & Associates
455 South 300 East, Suite 200
Salt Lake City, Utah 84111

Pl. Tr. 326

LIST OF SCHEDULES

SCHEDULE 1.1
Page 1 of 7

LaSALVIA MILK SHIPMENTS
TO OUT-OF-STATE CONSUMERS

1974-1975

Date Shipped	Total Pounds Shipped	Invoice Number	Total Value	Transportation Cost	M/P Service	Amount Received By LaSalvia	Handler's Charge	Less Any Additional Charges	Butterfat Content
			(Dollars)						(Percent)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
74/04/13-14	47,383	—	$3,445.59	$ 284.30	—	$3,161.29	—	—	3.45
75/04/30	50,940	4598	3,708.39	442.00	50.94	3,266.39	254.70	—	3.35
75/04/30	89,900	4595	6,588.17	561.60	89.90	6,026.57	449.50	—	3.45
75/06/27	49,120	—	3,580.85	—	—	3,580.85	2,054.10	—	3.30
75/06/29	49,780	—	3,628.96	—	—	3,628.96		—	3.30
75/06/30	51,080	4668	3,421.64	$1,076.40	51.08	2,294.16	255.40	—	3.40

SCHEDULE 1.3
Page 1 of 4

COMPARISON OF AMOUNT RECEIVED BY LaSALVIA FOR OUT-OF-STATE MILK SHIPMENTS WITH AMOUNT AVAILABLE IN STATE UNDER FEDERAL ORDER 131

1974 and 1975

	Total Pounds	Amount Received By LaSalvia	Calculated Amount For LaSalvia	Difference	Handler's Charge
		(Dollars)			
	(1)	(2)	(3)	(3)-(2) (4)	(5)
1974					
January	—	—	—	—	—
February	—	—	—	—	—
March	—	—	—	—	—
April	47,383	$ 3,161.29	$ 4,504.70	$1,343.41	—
May	—	—	—	—	—
June	—	—	—	—	—
July	—	—	—	—	—
August	—	—	—	—	—
September	—	—	—	—	—
October	—	—	—	—	—
November	—	—	—	—	—
December	—	—	—	—	—
Total 1974	47,383	$ 3,161.29	$ 4,504.70	$1,343.41	—
1975					
January	—	—	—	—	—
February	—	—	—	—	—
March	—	—	—	—	—
April	140,840	$ 9,292.96	$11,775.72	$2,482.76	$ 704.20
May	—	—	—	—	—
June	149,980	9,503.97	12,384.22	2,880.25	2,309.50
July	—	—	—	—	—
August	—	—	—	—	—
September	—	—	—	—	—
October	—	—	—	—	—
November	—	—	—	—	—
December	—	—	—	—	—
Total 1975	290,820	$18,796.93	$24,159.94	$5,363.01	$3,013.70

SCHEDULE 1.7

LOSS ON OUT-OF-STATE SHIPMENTS OF MILK
LaSALVIA DAIRY
1974-1981

	Loss On Out-Of-State Milk Shipments
	— (Dollars) —
Difference Between Amount That LaSalvia Received And Calculated Revenue On Out-Of-State Sales	$324,379.33
Amount LaSalvia Paid To Shamrock And Other Handlers	98,029.78
Less: Estimated Hauling And Administrative Charges Incurred By LaSalvia If Out-Of-State Milk Was Sold Within Order 131 Market Area	(30,300.00)
TOTAL ESTIMATED LOSS	$392,109.11

No. 86-1702

IN THE

Supreme Court of the United States

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v.

JEROME LASALVIA AND PEGGY LASALVIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION

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May 20, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals correctly held that disputed issues of material fact concerning petitioners' refusals to deal and monopolization of the production and sale of milk within the Central Arizona Milk Marketing Area required a remand for trial.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, Jerome and Peggy LaSalvia, hereby oppose the petition for a writ of certiorari filed in this case.

STATEMENT

1. Respondents operate an independent dairy farm in Laveen, Arizona, which is located within the Central Arizona Milk Marketing Area. 7 C.F.R. § 1131.2. Petitioner United Dairymen of Arizona ("UDA") is an agricultural cooperative made up of dairy farmers operating in the same milk marketing area where respondents do busi-

ness.[1] UDA operates a plant for the manufacture of cheese and powdered milk from Grade A raw milk.[2] In part because UDA maintained the only manufacturing facilities for converting raw milk into cheese or powdered milk and, in part, because of its coercive business practices, UDA achieved market dominance in the central Arizona milk marketing area. From 1975 to 1980, UDA's share of the relevant market (the production of milk and milk products within the geographic area covered by Order 131) increased from just under 85 percent to almost 89 percent. C.R. 449, Exhibit 23. As a consequence, respondents constituted petitioners' only significant competition within the milk marketing area.

From 1975 to 1981, despite having available capacity at its manufacturing plant, which was the only such plant within the milk marketing area, petitioner UDA refused to accept respondents' milk for processing. Indeed, during that period, UDA imported milk from outside of Arizona for use in its milk manufacturing plant.

During 1974 and 1975, petitioners refused to accept respondents' milk. Pet. App. A20. Petitioner Girard told one of the respondents in 1975 that he would not accept respondents' milk but that he "would check it out and if something changed . . . would let [respondents] know

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[1] The other two petitioners, Robert Girard and Leonard Cheatham, were the general manager and president of petitioner UDA respectively during the period relevant to the issues raised in the petition. Pet. App. A1-A2.

[2] The pricing and handling of Grade A raw milk are governed generally by the Agricultural Adjustment Act, 7 U.S.C. § 601 *et seq.* The regulations governing milk in the Central Arizona Milk Marketing Area are set forth in 7 C.F.R. part 1131 and are collectively referred to as "Order 131." The order establishes three classes of milk: Class I is milk used for consumption; Class II is milk used for soft dairy products, such as yogurt and Class III is milk used for powdered milk and cheese.

that [h]e'd take [their] milk." C.R. 329, Exhibit 46. Again in 1977 and 1978, respondents, through one of their attorneys, inquired whether UDA would then accept respondents' milk, but he was informed that UDA would not. C.R. 449, Exhibit 42.

2. On April 2, 1980, respondents filed the instant lawsuit against petitioners in the United States District Court for the District of Arizona, alleging that petitioners had engaged in various predatory practices in an attempt to monopolize the production and marketing of Grade A raw milk in central Arizona in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and that petitioners had restrained trade by engaging in various unilateral and concerted refusals to deal in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents alleged that, as a consequence of those antitrust violations, they had been unable to sell substantial quantities of their milk in the relevant market at the Milk Marketing Order 131 price.

Specifically, respondents challenged six practices: 1) petitioners' coercive use of full supply contracts with handlers (packagers) who purchase petitioners' milk, which precluded handlers from purchasing respondents' milk; 2) a unilateral boycott involving petitioners' refusal to purchase respondents' milk for processing at its manufacturing facility until 1981, when petitioners purchased some of respondents' milk but only at a price less than the Order 131 price to which respondents were entitled; 3) petitioners' use of secret rebates to its handlers; 4) petitioners' use of overly restrictive covenants not to compete entered into with UDA's members; 5) petitioners' agreements with out-of-state cooperatives which eliminated those cooperatives as available purchasers of respondents' milk and 6) petitioners' acquisition of control of the means to transport raw milk. Pet. App. A2-A3.

The district court entered summary judgment for petitioners. Pet. App. A14-A27. The court first held in a separate order that respondents lacked standing to litigate their monopolization allegations concerning the use of restrictive covenants not to compete, the use of secret rebates to handlers and petitioners' acquisition of key transportation facilities. *Id.* at A3. Subsequently, the court held that the causes of action based on the remaining allegations were barred by the four-year statute of limitations in the Clayton Act, 15 U.S.C. § 15b. The district court held that respondents knew that petitioners' refusal to deal was unequivocal by at least 1975 and that under the law of the Ninth Circuit,[3] petitioners' refusal began the running of the statute of limitations and nothing subsequent to that time gave rise to a new cause of action which would have extended the period for filing suit.[4] Pet. App. A23-A25.

The court of appeals reversed unanimously and remanded the case for trial. Pet. App. A1-A13. The court first held that respondents could properly challenge petitioners' restrictive covenants, secret rebates and acquisition of transportation facilities because these "were employed in an unlawful quest for market dominance" which caused harm to respondents of "the sort that the antitrust

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[3] *See, e.g., David Orgell, Inc.* v. *Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), cert. denied, 454 U.S. 816 (1981); *Steiner* v. *20th Century Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

[4] The district court also denied respondents' motion to amend their complaint to include allegations that when petitioners began to accept respondents' milk in 1981, petitioners refused to pay the required Order 131 minimum price and that this action was in furtherance of petitioners' monopolistic practices. Pet. App. A26. The court denied the request because 1) respondent knew of these practices for three years; 2) the allegations were a "disguised" challenge to petitioners' restrictive covenants and 3) the discovery period had ended. Pet. App. A26.

laws were intended to remedy." *Id.* at A5. Second, the court held that summary judgment was unwarranted with respect to the refusal to process respondents' milk because the initial refusal was, according to petitioner Girard's own account, "ambiguous." *Id.* at A8. In reversing, the court of appeals reaffirmed the general principle that a final refusal begins the running of the statute of limitations and that subsequent reaffirmations of the earlier refusal do not extend the limitations period, but held that on the record *in this case* that rule did not apply. In addition, the court noted that even if petitioners' refusal had been "final," that would not have justified dismissal of the claims based on petitioner UDA's "exploitation of its market position," which involved both injury to respondents and actions by petitioners during the four years prior to the filing of the complaint in this case.

Finally, the court of appeals held that petitioners' concerted refusal to deal constituted a continuing violation within the meaning of this Court's decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The court of appeals recognized that respondents' injuries did not arise solely out of petitioners' refusal to deal, but also because petitioner "UDA had used its market position to impose contracts on handlers within the [Central Arizona Milk Marketing Area] that prohibited them from dealing with [respondents]." Pet. App. A11.[5]

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[5] In so holding the court pointed out that respondents could only recover for damages actually incurred during the four-year period prior to the filing of the complaint. Pet. App. A12. The court of appeals also reversed the district court's refusal to permit respondents to amend their complaint. The court of appeals held that the amendment would cause petitioners no prejudice because the discovery concerning post-complaint injuries would be minimal and the issues were not new to the case. Pet. App. A12-A13.

ARGUMENT

The decision of the court of appeals is a correct application of settled principles of law to the specific facts of this case. Indeed, the decision below does not even finally resolve this case; the court merely remanded for a trial on respondents' claims. Accordingly, review by this Court at this time is wholly unwarranted.

1. Petitioners contend (Pet. 10-16) that the court of appeals erred in refusing to respect the district court's determination that petitioner UDA's refusal to deal was finally effected in 1975 and therefore respondents' lawsuit which was filed in 1980 is barred by the four-year statute of limitations. In the first place, review of this contention is unwarranted because it is inherently fact-bound; any decision on this issue would affect no one except petitioners and respondents. Second, the contention is predicated on a mischaracterization of "[t]he basis of respondents' antitrust action." Pet. 10. Petitioners analyze the case without the monopolization claims which the court of appeals reinstated. When the district court dismissed the lawsuit on statute of limitations grounds, it had already improperly dismissed for lack of standing respondents' challenge to a wide variety of anticompetitive practices.[6] Petitioners completely ignore the Ninth Circuit's reversal of that holding. Thus, even if deference were owed to a district court's determination to grant summary judgment, which is a novel proposition for which petitioners offer no case authority, none would be warranted here where the record before

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[6] Petitioners have presented no question concerning the portion of the court of appeals' decision which reinstated the evidence concerning the UDA's use of restrictive covenants, rebates to purchasers and the acquisition of milk transportation facilities. The court of appeals held that the district court's error on these issues, by itself, required reversal of the entry of summary judgment. Pet. App. A6. Thus, even if the Court granted the petition, it could not finally resolve this case.

the court of appeals and that before the district court were significantly different. Finally, even if the finality of petitioners' refusal to deal in 1975 were the sole issue in this case, which it is not, the court of appeals was clearly correct in holding that the evidence on that issue, which is obviously a material issue, was in dispute. First, petitioner Girard's testimony supports respondents' position; second, there was evidence of subsequent requests by respondents' attorneys which evidenced their understanding that the 1975 denial was not final, see page 3 *supra*; third, the fact that petitioners subsequently accepted respondents' milk demonstrates clearly that the 1975 refusal was not "immutable, final or irrevocable."

There is thus no conflict between the decision below and *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963), relied upon by petitioners (Pet. 15). Both the Ninth and Sixth Circuits apply the same rule—a final refusal to deal begins the statute of limitations and mere subsequent refusals do not create new causes of action which would extend the limitations period. See *Pace Industries, Inc.* v. *Three Phoenix Co.*, No. 85-1754 (9th Cir. Mar. 24, 1987), slip op. 11 (applying finality standard to bar lawsuit on limitations ground); *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir.), cert. denied, 444 U.S. 900 (1979); *Hennegan* v. *Pacifico Creative Service, Inc.*, 787 F.2d 1299 (9th Cir.), cert. denied, 107 S.Ct. 279 (1986). Nothing in *Garelick* suggests that an equivocal refusal such as petitioners' begins the running of the limitations period, when, as here, subsequent acts do more than reaffirm the prior action and cause new and accumulating injury to the plaintiff. See *Pace Industries, Inc.* v. *Three Phoenix Co.*, *supra*, slip op. 10.[7] Thus, petitioners' claim is nothing more than a

[7] Nor is there any inherent contradiction in the court of appeals' analysis of the record. Simply because respondents can testify in 1983 that petitioners refused to deal with them does not mean that

disagreement with the court of appeals over whether on this record there was a disputed issue of material fact.

2. Petitioners argue (Pet. 16-22) that the court of appeals also erred in holding that the complaint stated a continuing violation of the antitrust laws which extends the limitations period for filing a complaint.[8] The fundamental flaw in petitioners' contention is their refusal to deal with respondents' theory of the case as reflected in the court of appeals' decision. The court of appeals correctly interpreted respondents' complaint as properly stating a cause of action for monopolization based on a variety of predatory practices, including but not limited to petitioners' refusal to accept respondents' milk for processing. Petitioners repeatedly argue (Pet. 16, 19, 21) that the final "overt act" occurred in 1975 when they rejected respondents' request. But this ignores the holding below that "plaintiffs claim harm from UDA's exploitation of its market position" as part of a monopolization effort. Pet. App. A10. The court of appeals could not have been plainer on this issue: "The losses claimed in [respondents'] damage analysis stem not from the initial refusal, but from the unlawful monopolization of the market at issue." *Ibid.* The prac-

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they understood that to be petitioners' position in 1975. The evidence of subsequent contacts by respondents' counsel concerning processing of respondents' milk during 1976 and 1977 is certainly strong evidence that respondents did not understand the 1975 refusal to be the final word even had subsequent events revealed that petitioners did not intend to deal with respondents as part of a scheme to monopolize milk production and distribution. In fact, petitioners did eventually accept respondents' milk, albeit at a discriminatory price.

[8] This issue is clearly not ripe for review by this Court. The court of appeals merely indicated that on remand the source of respondents' damages should be an issue separate from the refusal-to-deal claim and that it was possible that respondents could prove a continuing violation. Pet. App. A10. The parties have not had an opportunity to develop the record on this issue yet and thus consideration of the issue now by this Court would be premature.

tice that caused these injuries extended well beyond 1975 and, in fact, respondents properly amended their complaint to allege that such practices continued well after the original complaint was filed in this case.[9] Under respondents' broader theory, which is not challenged in the petition, the decision below, remanding so that the parties could be afforded an opportunity to "address the source and timing of the damage question" (Pet. App. A10), was clearly appropriate and raises no issue warranting review by this Court.[10]

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[9] Petitioners have not challenged the ruling that the district court erroneously refused to allow respondents to amend their complaint to assert overt predatory acts which caused new harm during the pendency of the lawsuit.

[10] Only by assuming that this case involves no more than a refusal to deal can petitioners argue that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 418, 502 n.15 (1968), has been misapplied. The court below did not hold that a single refusal to deal could ever constitute a "continuing violation"; it held that petitioners' "damaging contracts" inflicted continuing harm upon respondents which extended the limitations period. Pet. App. A11. This application of the continuing violation theory is unexceptionable. Compare *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgment of the court of appeals in this case should be denied.

Respectfully submitted,

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May 20, 1987

(3)

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REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION

Introduction

1. Respondents' Brief In Opposition (Br.) attempts to rewrite the decision below in an effort to make it compatible with established legal principles from which it departs. The decision does not "reaffirm the general principle that a final refusal begins the running of the statute of limitations and that subsequent reaffirmations of the earlier refusal do not extend the limitations period" (Br. 5). The decision holds that an illegal refusal to deal will not begin the running of the statute of limitations unless the initial refusal is "irrevocable, immutable, permanent and final." Br. 7, Pet. A7. Nor does the court of appeals hold that respondents may challenge petitioner's "restrictive" practices "because these 'were employed in an unlawful quest for market dominance' which caused harm to respondents". Br. 4. What the decision says is "[r]ather than giving rise to liability independently, the allegedly unlawful practices serve an evidentiary function." Pet. A5.

Nothing in the decision below supports respondents' assertion that "[f]rom 1975 to 1981 . . . UDA refused to accept respondents' milk for processing" (Br. 2)[1]; nor does the decision state that "UDA's 'exploitation of its market position' . . . involved . . . actions by petitioners during the four years prior to filing of the complaint. . . ." Br. 5. The decision holds, instead, that "despite the finality of the refusal" and absence

[1] "After [May 23, 1975] Plaintiff never again directly contacted UDA about purchasing his milk until after this action was filed in 1980." Pet. A21.

of overt acts during the limitation period "[i]f . . . damage accrued during [the limitation period] then the action is not barred . . . ." Pet. A10.

2. Respondents' brief ignores the district court's factual determinations, undisturbed by the appellate court, that the discovery record is devoid of allegations or evidence of overt acts by petitioner during the limitations period (Pet. A24) and that the refusal by other processors during the limitations period to buy respondents' milk "were reaffirmations of the original [1975] refusal(s) to deal." *Id.* at A23. The district court's finding as an "ultimate fact" (*Pullman-Standard v. Swint*, 456 U.S. 273, 286, 293 (1982)) that "Plaintiffs' cause of action accrued no later than 1975" (Pet. A24) was based on undisputed "historical facts" (*Pullman-Standard* at 289, n.19) admitted by respondents which demonstrated that "Plaintiffs themselves knew of and believed they had a cause of action in 1975" (Pet. A24) coupled with the fact that "Plaintiffs . . . allege no overt acts on the part of UDA during the limitations period" (*ibid.*) and "never contacted UDA between 1975 and the time the action was filed." Pet. A22.

Respondents argue that the appellate court nonetheless was correct in holding that the "finality of UDA's 1975 refusal to deal with the LaSalvias" (Pet. A8) is a jury question because UDA purchased some milk from respondents in 1981, a year after they brought suit, and testimony by UDA's manager, Girard, concerning his 1975 refusal "can be read to give . . . hope that UDA would relent." *Ibid.* But Girard's subjective mental state, whether expressed or not, obviously cannot create a genuine fact issue as to respondents' expressed belief in 1975 that they had a cause of action against UDA.

The issue is not whether UDA considered its refusal to deal with respondents in 1975 as irrevocable and final. The issue is whether respondents asserted and believed that UDA's refusal in 1974 and 1975 to deal with them was emphatic and unlawful. On that question there is simply no genuine issue.

3. Respondents contend that review of the appellate court's decision is unwarranted because: (1) "it is inherently fact bound" (Br. 6); (2) deference to the district court's determination urged by petitioner is a "novel proposition" devoid of supporting authority (*ibid.*); (3) there is no conflict between the decision below and the cases relied on by petitioner (Br. 7) and (4) the court of appeals "continuing violation" holding based on *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 418 (1968), is correct. Br. 8-9.

ARGUMENT

1. Where An Appeal Is From A Summary Judgment Which Decides An Issue Of Ultimate Fact Based Upon The Non-Moving Party's Allegations, Admissions And Documentary Evidence, The Standard Governing Appellate Review Under Rule 52(a) Should Apply.

The Ninth Circuit's uniform rule that findings by a trial judge in a summary judgment proceeding are not entitled to deference upon review (Pet. 11) stems from the unwarranted notion that only questions of law are decided on summary judgment. See Schwartzer, J., *Summary Judgment Under The Federal Rules: Defining Genuine Issues Of Material Fact*, 99 F.R.D. 465, 489 (1984). The decision below holds that the "finality" of UDA's 1975 refusal to deal with the respondents is a "material factual question" on which the evidence is "ambiguous" (Pet. A8-9), notwithstanding the district court's contrary finding based on respondent counsel's contemporaneous notes, respondents' deposition testimony and contemporaneous documents (Pet. 6, A20-21) that in 1975 "Plaintiffs believed that UDA's and the other handlers' refusals to deal with them were final." Pet. A24.

In characterizing the "finality of UDA's refusal to deal"[2] as a disputed material fact issue, the court of appeals did not decide a question of law; it simply concluded that it was free to reexamine the undisputed factual record which formed the basis of the district court's finding, reject it as "ambiguous" (Pet. A8) and require its submission to a jury for resolution. *Ibid.*

---

[2] Whether "finality" of an antitrust defendant's refusal to deal is relevant to the question of when a cause of action under §4 of the Clayton Act arises is discussed *infra*.

That conclusion is at odds with the rationale of this Court's holding in *Pullman-Standard, supra*, that a trial court's finding, "whether an ultimate fact or not", (456 U.S. at 293) based on admitted or established "historical facts" and involving no assessment of witness demeanor or credibility is reviewable under the clearly erroneous standard of Rule 52(a). "This is so even when the district court's findings . . . are based on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). *Pullman-Standard* "rejects implicitly the rationale underlying de novo review of summary judgment, i.e. that the court of appeals is equally well situated to decide the issue because it has before it the same record as the trial court. . . ." Schwartzer, J., *supra*, 99 F.R.D. at 490-91. See *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *Worthen Bank & Trust Co. v. Franklin Life Ins. Co.*, 370 F.2d 97, 99 (8th Cir. 1966).

Respondents' belief "that UDA's and the other handlers' refusal to deal with them were final" (Pet. A24) removes the "finality" issue from the case. Once a fact is admitted or alleged by the party opposing a motion for summary judgment, no genuine issue as to that fact remains for resolution by a jury. *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

2. The Ninth Circuit's "Finality" Requirement Is In Conflict With Decisions Of Other Circuits.

Respondents contend that the court of appeals was correct in holding that the finality of UDA's 1975 refusal to deal was a disputed material fact issue because there is evidence that the 1975 refusal was not "immutable, final or irrevocable." Br. 7. But "immutable, irrevocable finality" is a metaphysical,

not a legal, concept that only the Ninth Circuit demands that a defendant establish as a basis for determining when a cause of action arises and the statute begins to run in a refusal to deal case. The Ninth Circuit's and respondents' reliance on the claimed reiterated request by respondents' counsel in 1977-78 (Br. 3, 7) belies their assertion that "[t]here is no conflict between the decision below and *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963)." Br. 7.

There is nothing in *Garelick* or in the other cases cited by petitioner (Pet. 13-14) that conditions the commencement of the running of the statute on a showing by defendant that his initial refusal to deal was "irrevocable, immutable, permanent and final." The word "final" does not appear in the *Garelick* case. *Garelick* and the other cases cited by petitioner, hold, simply, that an illegal refusal to deal creates a cause of action when it occurs and is not restarted by repeated requests which the defendant refuses. II. P. Areeda & D. Turner, *Antitrust Law*, ¶325b at 121 (1978).

Adoption of a rule of finality in refusal to deal cases that would require the refusal to be "irrevocable, immutable, permanent and final" to commence the running of the limitations period would effectively gut the statute of limitations as a statute of repose and disserve the remedial purposes of the antitrust laws. It would dissuade a buyer, otherwise inclined to deal with a seller after an unequivocal initial refusal (as in this case), from ever doing so for fear that a suit filed six years later based on the initial refusal was not barred because the refusal was not "final" enough.

3. Petitioner's "Continuing Violation" Of The Sherman Act Does Not Continue The Accrual Of A Cause Of Action Absent An Overt Act During The Limitation Period Which Injures Respondents.

Respondents' reliance on "a variety of predatory practices" (Br. 8) evidencing UDA's continuing "monopolization of the market at issue" (Br. 8) as the basis for extending the limitations period ignores the basic principle that the gist of the §4 Clayton Act action is injury to a plaintiff's business or property not the mere violation of the statute. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, —— U.S. ——, 106 S.Ct. 1348 (1986);[3] *Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156, 165 (1922). There is no genuine issue of fact as to the source of respondents' damage or when it occurred.[4] Respondents have described it with unmistakable clarity:

> Until approximately 1974, plaintiffs were able to sell all of their milk in the Arizona market for the so-called "blend price" . . . . The gravamen of this lawsuit is that defendants, by their monopolistic practices and . . . concerted activities . . . have forced plaintiffs to divert their milk from the . . . market . . . or sell it in other markets for a . . . lower . . . price.

Pet. A56; see also *id.* at 61.

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[3] "[R]espondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from illegal conduct." 106 S.Ct. at 1356.

[4] Respondents' contention that the source of respondents' damage is not ripe for review (Br. 8, n.8) ignores the fact that petitioner's summary judgment motion was filed following the close of all discovery and the submission of respondents' proposed final pre-trial order which set out in elaborate detail respondents' "Lost Income Analysis". Pet. A63.

The only actionable injury that respondents could suffer as a result of petitioner's "monopolization of the market" was that caused by the refusal of petitioner and the milk dealers to buy respondents' milk. That refusal occurred "[d]uring 1974 and 1975." Br. 2. The "mere subsequent refusals do not create new causes of action which would extend the limitations period." Br. 7.

The "overt acts" in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 418, 502 n.15 (1968) which constituted the "continuing violation" are absent here. Neither *Hanover* nor *Twin City Sportservice, Inc. v. Charles O. Finley*, 512 F.2d 1264 (9th Cir. 1975) (Br. 9, n.10), relied on by the court of appeals (Pet. A11), holds that the mere existence of an unlawful contract is sufficient to continue the running of the limitations period. Finley's 1968 antitrust counterclaim was not barred because his cause of action arose from Sportservice's "overt act" in suing to enjoin Finley's breach in 1967 of an illegal 1954 contract. *Airweld, Inc. v. Airco*, 742, 1184, 1190 (9th Cir. 1984); *Aurora Enterprises v. National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir. 1982).

Here, there is neither allegation by respondents, suggestion in the discovery record nor reliance by the court of appeals on a contention that petitioner sought to enforce the alleged full supply contracts during the limitations period. Indeed, the district court's finding, based on a full discovery record and "[t]he parties statement of facts pursuant to Local Rule 11(i)"[5] (Pet. A20), that "there are no clear cut allegations

[5] Local Rule 11(i), United States District Court, District of Arizona provides: "(1) Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies in support of his motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a

or evidence of overt acts by Defendant UDA during the limitations period" (Pet. A24) was not disturbed by the court of appeals. The court of appeals "continuing harm doctrine" (Pet. A12) simply dispenses with the need for an overt act during the limitations period required by this Court and other circuits to avoid the bar of the statute. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); see Pet. 17-20.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgment of the court of appeals should be granted.

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Respectfully submitted,

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specific portion of the record where the fact may be found (i.e., affidavit, deposition, etc.) Any party opposing a motion for summary judgment must comply with the foregoing in setting forth the specific facts, which the opposing party asserts, including those facts which establish a genuine issue of material fact precluding summary judgment in favor of the moving party. . . ."